(5)

No. 98-316-CFY Title: Office of the President, Petitioner
v.
Office of Independent Counsel

Docketed: August 21, 1998 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Aug 21 1998	Petition for writ of certiorari filed. (Response due September 23, 1998)
	Aug 21 1998	Motion of petitioner for leave to file unredacted appendix under seal filed.
	Sep 21 1998	Order extending time to file response to petition until September 23, 1998.
	Sep 23 1998	Brief of respondent Office of Independent Counsel in opposition filed.
	Oct 5 1998	Reply brief of petitioner Office of the President filed.
	Oct 7 1998	DISTRIBUTED. October 30, 1998
	Oct 14 1998	LODGING of Independent Counsel filed. (NP)
	Nov 2 1998	REDISTRIBUTED. November 6, 1998
	Nov 9 1998	Motion of petitioner for leave to file unredacted appendix under seal GRANTED.
	Nov 9 1998	Petition DENIED. Dissenting opinion by Justice Breyer with whom Justice Ginsburg joins. (Detached opinion.)

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1 PP

No. 98-

In the Supreme Court of the United States

OCTOBER TERM, 1997

OFFICE OF THE PRESIDENT, PETITIONER,

v.

OFFICE OF INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Deputy White House Counsel may be compelled to disclose to a grand jury, pursuant to a subpoena issued by an Independent Counsel, confidential communications he had with the President of the United States in the course of providing legal advice concerning the President's official responsibilities.

LIST OF PARTIES IN THE COURT OF APPEALS

The parties in the court of appeals were the Office of the President ("White House"), Petitioner herein, and the Office of Independent Counsel ("OIC"), Respondent herein. Additionally, William J. Clinton in his individual capacity was a party in the court of appeals as to issues relating solely to his individual capacity, rather than his official capacity as President of the United States. The instant Petition raises no issues concerning President Clinton in his individual capacity, and accordingly, he is not individually named herein.

Bruce R. Lindsey, Deputy Counsel and Assistant to the President, was a nominal respondent below as the recipient of the subpoena at issue. He is not separately named as a party herein.

The United States of America, Acting Through the Attorney General, participated as *amicus curiae* in both the court of appeals and the district court.

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STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 27, 1998, and its mandate issued on August 11, 1998. 28 U.S.C. § 1254(1) supplies the basis for jurisdiction in this Court. Pursuant to this Court's Rule 29.4(a), this Petition has been served on the Solicitor General.

STATEMENT OF THE CASE

1. In January 1998, upon expansion of the jurisdiction of Independent Counsel Kenneth W. Starr, a federal grand jury in Washington, D.C., began investigating "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law[.]" *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 497–498 (D.C. Cir. 1998) (quoting Independent Counsel's jurisdictional grant), pet. for cert. filed sub nom. *Dow Jones & Co.* v. *Clinton*, 66 U.S.L.W. 3790 (U.S. June 3, 1998) (No. 97-1959).

2. On January 30, 1998, Respondent, the Office of Independent Counsel ("OIC"), subpoenaed Bruce R. Lindsey, Deputy Counsel and Assistant to the President, to testify before the grand jury. Mr. Lindsey appeared before the grand jury on three occasions in February and March, 1998. When asked questions concerning his confidential communications with the President in the course of his official duties as Deputy White House Counsel, Mr. Lindsey declined to answer, asserting the attorney-client privilege of the Office of the President and the attorney work product doctrine.[1] The OIC moved to compel Mr. Lindsey to disclose his confidential communications with the President. The Office of the President, as holder of the attorney-client privilege, opposed the OIC's motion to compel.

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[1] Where pertinent, Mr. Lindsey also asserted that certain of the communications the OIC sought were protected by the presidential communications privilege, commonly referred to by the broader term "executive" privilege. See *United States* v. *Nixon*, 418 U.S. 683 (1974); *In re Sealed Case (Espy)*, 121 F.3d 729, 737–740 (D.C. Cir. 1997). The White House did not appeal from the district court's ruling on the presidential communications privilege (App. 4a), and the issue is not before this Court.

3. On May 4, 1998, the United States District Court for the District of Columbia (Johnson, C.J.), granted the OIC's motion to compel Mr. Lindsey to testify. See *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998) (App. 36a–66a).[2] The district court ruled that "an absolute governmental attorney-client privilege does apply to FOIA cases and other civil cases" involving the government and private litigants. (App. 51a). Rejecting the OIC's reliance on the Eighth Circuit's decision in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997), for the proposition that no attorney-client privilege existed at all, the district court held "that a governmental attorney-client privilege does apply in the federal grand jury context." (App. 52a). Notwithstanding its recognition that governmental clients, like all other clients, hold a privilege that "is absolute in civil cases," the district court declared that it was "not willing to recognize an absolute privilege" "in the federal grand jury context." (*Ibid.*). Instead, it held that the "attorney-client privilege must be qualified" in grand jury cases when a governmental entity is the client. (*Ibid.*). Analogizing to cases involving the presidential communications privilege, the district court held that "the governmental attorney-client privilege is qualified in the context of a federal grand jury investigation and that, like the executive privilege, it can be overcome by a showing of need." (App. 60a). It adopted the same two-part "need" and "unavailability" test set out by the court of appeals in a case involving the presidential communications privilege for cases involving the attorney-client privilege. (App. 60a–62a (discussing *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997))). Based on the OIC's *ex parte* and *in camera* submission,

[2] The district court's decision of May 4, 1998 was issued under seal. A redacted version was released to the public on May 27, 1998.

All citations herein to the decisions of the district court and the court of appeals are to the redacted versions released by those courts to the public. The public versions of the courts' opinions are reproduced in the Appendix to this Petition, and this Petition itself is in its entirety a public document. For the convenience of the Court, we will separately submit a sealed appendix containing unredacted versions of the opinions below, together with a supporting motion for leave to file the unredacted materials under seal. The issues raised in this Petition, however, relate solely to the holdings of the courts below that are discussed in the public portions of their opinions.

the court concluded that "the OIC's showing of need has overcome Lindsey's assertions of the governmental attorney-client privilege," and granted the motion to compel. (App. 63a–64a).

4. On May 26, 1998, the district court granted in part and denied in part a Motion for Reconsideration In Part filed by the White House. The district court's memorandum opinion concerning the motion for reconsideration is unreported and remains under seal.[3] The White House timely appealed the district court's decisions of May 4, 1998 and May 26, 1998 to the United States Court of Appeals for the District of Columbia Circuit.

5. On May 28, 1998, before the court of appeals could set a briefing schedule, the OIC petitioned this Court to review the district court's decision before judgment in the court of appeals. The White House opposed the grant of certiorari before judgment, arguing that this Court should first allow "the normal appellate process . . . [to] narrow and shape the issues, and thus enable the parties to determine whether any remain that would warrant this Court's review." White House's Br. in Opp. at 2, *United States* v. *Clinton*, No. 97-1924. Because both sides had moved the court of appeals for expedited disposition of the appeal, the White House further argued that "the benefits that might flow from granting certiorari before judgment can reasonably be achieved without losing the benefit of that court's analysis." *Ibid.*; see also *id.* at 11–12. This Court denied certiorari. *United States* v. *Clinton*, 118 S. Ct. 2079 (1998). Upon denial of the OIC's petition, the court of appeals set an expedited briefing and argument schedule. Argument was held on June 29, 1998.

6. On July 27, 1998, a sharply divided panel of the court of appeals affirmed the district court's ruling granting the OIC's motion to compel, but on grounds that significantly expanded that ruling in favor of the OIC (despite the fact that the OIC had not cross-appealed). *In re Lindsey*, No. 98-3060, — F.3d —, 1998 WL 418780 (D.C. Cir. July 27, 1998) (per curiam, 2–1 decision, Judges Randolph and Rogers in the majority, Judge Tatel in dis-

[3] The district court's ruling on the Motion for Reconsideration In Part did not address the issue presented in this Petition. It is included, for completeness, in the sealed version of the Appendix.

sent) (App. 1a–35a). The panel majority agreed with the district court that a governmental client, like all other clients, holds an attorney-client privilege that "is rather absolute in civil litigation." (App. 11a). In criminal proceedings, however, the panel majority disagreed with the district court that even a qualified privilege, subject to being overcome on a proper showing, existed. Instead, the panel majority concluded that whether an attorney-client privilege *exists at all* in criminal proceedings when a governmental agency is the client turns on the *content of the communications* sought to be compelled. (App. 2a ("The extent to which the communications of White House Counsel are privileged against disclosure to a federal grand jury depends, therefore, on *whether the communications contain information of possible criminal offenses*.") (emphasis added)). The panel majority ruled that, if White House attorneys' "communications with the client contain information pertinent to possible criminal violations," then those attorneys "may not assert an attorney-client privilege before a federal grand jury[.]" (App. 15a).[4]

7. Judge Tatel again dissented from a ruling of the court of appeals narrowing the attorney-client privilege. Cf. *In re Sealed Case*, 124 F.3d 230, 237–242 (D.C. Cir. 1997) (2–1 decision) (Tatel, J., dissenting), rev'd sub nom. *Swidler & Berlin* v. *United States*, 118 S. Ct. 2081 (1998). So sharp was the split among the panel members that they were unable even to agree how to formulate the issue before them: whether the case involved an attempt to carve a new exception out of the settled attorney-client privilege,

[4] See also *id.* at 12a (no privilege attaches to communications "about alleged crimes within the executive branch"); 14a (attorney must "provid[e] evidence of the possible commission of criminal offenses within the government"); 17a (no privilege if communications contain "evidence of crimes committed by government officials"); 18a (distinguishing situation involved in Iran/Contra investigation; privilege may have remained applicable there because there was "no indication that the information sought from [White House Counsel] constituted evidence of any criminal offense"); 19a (no attorney-client privilege if "the communications reveal information relating to possible criminal wrongdoing"); 23a (attorney may not assert privilege "if he possesses information relating to possible criminal violations"); 24a (no privilege if "government attorneys learn, through communications with their clients, of information related to criminal misconduct").

as Judge Tatel believed (App. 26a–27a); or whether it instead involved an attempt to create a new privilege previously unknown to the common law, as the majority saw it. (App. 11a–12a).

Judge Tatel noted that settled law provided that "the attorney-client privilege extends to a communication of a governmental organization . . . and of an individual officer . . . of a governmental organization." (App. 25a (internal quotations and citation omitted)). He found the President's need for confidential legal advice to be more, not less, compelling than that of any other governmental official. (App. 29a). Judge Tatel agreed with the Attorney General that "the President's pressing need for effective legal advice knows no parallel in government." (App. 30a (internal quotations and citation omitted)). Judge Tatel further found that this need, however critical standing alone, took on an even greater importance in proceedings specifically targeting the President, including independent counsel investigations and "press and congressional scrutiny." (App. 30a–31a). In such situations, the public interest in ensuring that the President receives accurate legal advice is singularly compelling:

> No President can navigate the treacherous waters of post-Watergate government, make controversial official legal decisions, decide whether to invoke official privileges, or even know when he might need private counsel, without confidential legal advice. Because of the Presidency's enormous responsibilities, moreover, the nation has compelling reasons to ensure that Presidents are well defended against false or frivolous accusations that could interfere with their duties. The nation has equally compelling reasons for ensuring that Presidents are well advised on whether charges are serious enough to warrant private counsel. I doubt that White House counsel can perform any of these functions without the candor made possible by the attorney-client privilege.

(App. 31a).

Judge Tatel also rejected the majority's assertions that legal advice merits no greater protection than political advice the Presi-

dent receives from non-attorneys (App. 27a–28a), that a statute which is facially inapplicable to the White House (28 U.S.C. § 535(b)) alters the privilege analysis (App. 28a), and that prior instances in which the privilege had not been invoked should inform the analysis when it is. (*Ibid.*). He also criticized the perverse incentive created by the majority's opinion, which effectively encouraged government officials not to discuss potentially sensitive official matters with counsel for their agency. (App. 26a ("Presidents may well shift their trust on all but the most routine legal matters from White House counsel, who undertake to serve the Presidency, to private counsel who represent its occupant")). Judge Tatel predicted that the majority's content-based assessment of the privilege, by which the existence of the privilege turned on a *post hoc* assessment of the contents of the subpoenaed communications, would have a profound chilling effect on government officials' willingness to consult with counsel. "Rarely will White House counsel possess cold, hard facts about presidential wrongdoing that would create a strong public interest in disclosure,"[5] he stated, "yet the very possibility that the confidence will be breached will chill communications." (App. 26a).

REASONS FOR GRANTING THE WRIT

Both the Office of the President and the Office of the Independent Counsel have now asked this Court to review this case, for it presents an issue the resolution of which is critical to the operation of our system of government.

The panel majority has held that an Independent Counsel, by issuing grand jury subpoenas to lawyers in the White House Counsel's office, may unilaterally require the disclosure of legal advice given to the President on matters critical to the performance of his

[5] The Independent Counsel produced no evidence that this is such an exceptional case. To the contrary, the record reflects that Mr. Lindsey has testified that he has no evidence that any government official, including the President, committed perjury or obstruction of justice. See White House Br. in Opp. 14 n.6, *United States* v. *Clinton*, No. 97-1924. Judge Tatel also noted that the OIC had neither alleged nor proved that Mr. Lindsey's testimony implicated any of the established exceptions to the privilege that apply when the attorney-client relation is abused. (App. 31a–32a).

constitutional responsibilities. The decision of this Independent Counsel to pursue the disclosure of such advice—including advice on the very issue of whether to assert the privilege the OIC challenges—has had for this President, and will have for future Presidents, a dramatic effect on his ability to seek the candid and forthright advice he needs and, most tellingly, on his ability to defend himself against a challenge to his constitutional status as the Nation's chief executive.

Whether the President may confer with his official counsel on official government matters and have the same confidence enjoyed by any other client that his communications with his lawyers will remain confidential is a seemingly simple question to which the panel majority gave an oddly disjointed answer: yes, if the communications are later sought to be discovered in a civil case; no, if the communications contain evidence of a crime and are later sought by a grand jury; and maybe or maybe not, if the communications are sought by a grand jury but do not contain such evidence. This puzzling ruling rested on a peculiarly tortuous analysis that brushed aside decades of settled precedent, virtually all the relevant scholarly authority, the thoroughly debated consensus of the American Law Institute, the demands of our constitutional system of checked and balanced powers, the lessons of "reason and experience," and essentially every other source of persuasive authority to which a precedent-minded jurist would ordinarily turn. This deviation from the settled conception of the absolute privilege between attorney and client calls compellingly for this Court's intervention to forestall the pernicious consequences of the judgment below both for the institution of the Presidency and for the Nation it serves.

By expressly creating a different attorney-client privilege for criminal cases than recognized in civil cases, the panel majority committed precisely the same error that led this Court to reverse the court of appeals' decision in *Swidler & Berlin* v. *United States*, 118 S. Ct. 2081, 2087 (1998) ("there is no case authority for the proposition that the privilege applies differently in criminal and civil cases"). Moreover, the panel did so in a context in which the President's need for, and entitlement to, confidential legal advice is at its zenith: in preparation for potential impeachment proceed-

ings, the ultimate confrontation between branches of government known to our Constitution. By imposing on the President a unique disability not imposed on any other litigant, and by doing so in a situation fraught with consequence for our system of checks and balances, the panel majority grievously erred. Review by this Court is manifestly necessary to restore the constitutional balance and to clarify the divergent standards that have been applied to the attorney-client privilege by every court to have considered it.

I.
THE PANEL MAJORITY'S RULING DEPARTED FROM PRECEDENT UPHOLDING THE ATTORNEY-CLIENT PRIVILEGE

The history and purposes of the attorney-client privilege are well known to this Court, and we will forgo any lengthy exegesis of the general principles underlying the rule of confidentiality. This Court's recent decision in *Swidler & Berlin* succinctly summarized the core purposes the privilege serves:

> The attorney-client privilege is one of the oldest recognized privileges for confidential communications. . . . The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."

Swidler & Berlin, 118 S. Ct. at 2084 (citations omitted).

The contours of the attorney-client privilege at common law are well understood. Subject to well-defined exceptions, the privilege attaches to confidential communications between any two parties standing in the relationship of attorney (acting as such) and client. Thus, the question this case presents is simply whether the Office of the President, and the President in his official capacity as head of that Office—indeed, of the Executive Branch, is a "client" within the meaning of the established privilege. If so, the panel majority grievously erred, for the common law knows no distinctions among different types of cases—or different types of clients—when applying the attorney-client privilege. And a change in

the type of case or the identity of the client does not, contrary to the panel majority's assertion, create a "new" privilege as to which the societal interests in confidentiality and disclosure must be balanced anew.

A. The Attorney-Client Privilege Does Not Apply Differently In Civil And Criminal Cases.

The panel majority's opinion rests on the fundamental premise that the attorney-client privilege available to a governmental client in a civil case may not apply when a confidential attorney-client communication is sought to be compelled in criminal proceedings. The jurisprudence supporting the right of governmental clients to confer with counsel in confidence is well established in the District of Columbia Circuit, as one would expect given that jurisdiction's status as the headquarters of most of the significant divisions of the government. See, *e.g.*, *Tax Analysts* v. *IRS*, 117 F.3d 607, 618–620 (D.C. Cir. 1997); *Brinton* v. *Dep't of State*, 636 F.2d 600, 603–604 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981); *Coastal States Gas Corp.* v. *Dep't of Energy*, 617 F.2d 854, 862–863 (D.C. Cir. 1980); *Mead Data Cent.* v. *Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). The panel majority conceded that this and other case law established "a government attorney-client privilege that is rather absolute *in civil litigation*." (App. 11a (emphasis added)). In the criminal context, however, the majority declared that "those cases do not necessarily control the application of the privilege[.]" (*Ibid.*).

But they do, and must. Both this Court and Congress have unequivocally foreclosed the majority's line of reasoning and declared that the privilege applies equally in civil and criminal cases. By declaring that the contours of the common-law attorney-client privilege shift, depending on the identity of the client asserting it and the context in which it is raised, the majority opinion drains from the privilege the very quality—assurance and predictability *ex ante*—that this Court has long held (and recently reaffirmed) is essential to enable the privilege to serve its purpose.

1. First, the panel majority's proffered distinction between civil and criminal cases was squarely before this Court in *Swidler & Berlin*, and was rejected.

In that case, a divided panel of the court of appeals (with Judge Tatel in dissent) surveyed the common-law authorities concerning the continuing force of the attorney-client privilege after the client's death. The panel majority identified "a discrete realm (use in criminal proceedings after death of the client) where the privilege should not automatically apply." *In re Sealed Case*, 124 F.3d at 234. In its brief to this Court defending the court of appeals' distinction, the OIC strenuously argued that "several privileges do *not* apply in criminal proceedings although they may apply in civil proceedings." Resp. Br. 13, *Swidler & Berlin* v. *United States*, No. 97-1192 (typescript brief). The OIC reiterated this distinction at oral argument. *Swidler & Berlin*, Oral Arg. Tr. 49. This Court squarely rejected the civil/criminal distinction, on the grounds that "there is no case authority for the proposition that the privilege applies differently in criminal and civil cases[.]" *Swidler & Berlin*, 118 S. Ct. at 2087. Furthermore, this Court observed, an attorney-client privilege applying differently in civil and criminal cases made no sense, because "a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or criminal matter[.]" *Ibid.* Because such an *ex ante* assurance of confidentiality is necessary if the privilege is to serve its function, its absence "introduces substantial uncertainty into the privilege's application." *Ibid.* Such uncertainty is fundamentally incompatible with the purposes of the attorney-client privilege, for "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981).

The confusion and doubt that likewise are the inevitable consequences of the panel majority's decision here can only chill the communications the privilege exists to foster. As Judge Tatel noted in dissent in this matter, "[c]lients, in this case Presidents of the United States, will avoid confiding in their lawyers because they can never know whether the information they share, no matter how innocent, might some day become 'pertinent to possible criminal violations.'" (App. 26a). In giving the attorney-client privilege a different, and narrower, scope in criminal than in civil proceedings, the panel majority has sharply devalued the privilege across

the board, for all communications, and contradicted binding precedent of this Court. Yet, the panel majority never even attempted to square its holding recognizing different attorney-client privileges in civil and criminal cases with this Court's rejection of such a distinction in *Swidler & Berlin*.

2. What is more, the panel majority's decision flouts Fed. R. Evid. 501. Rule 501 forbids the courts from drawing the civil/criminal distinction adopted by the panel majority. That rule instructs "that privileges shall continue to be developed by the courts of the United States under a *uniform standard applicable both in civil and criminal cases*." Fed. R. Evid. 501 adv. comm. note (emphasis added). See also Fed. R. Evid. 1101(c) ("rule with respect to privileges applies at all stages of all actions, cases and proceedings"). Creation of a unique exception to the settled attorney-client privilege applicable only in criminal cases represents defiance, not proper exercise, of Rule 501's authority to apply common-law privileges, and flatly contravenes Rule 1101.

3. No commentator shares the panel majority's conclusion that the scope of the attorney-client privilege should vary depending on the type of case in which it is asserted. See, *e.g.*, 8 JOHN H. WIGMORE, EVIDENCE §§ 2294–2295 (McNaughton rev. ed. 1961) (privilege applies in all types of litigation and even outside litigation context), 2309a (privilege applies in administrative proceedings); 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 172, at 227–229 (2d ed. 1994) ("federal common law privileges apply in federal criminal prosecutions, federal question cases, and other cases with respect to issues governed by federal law"). Thus, no scholarship supports the panel majority's narrowing of the attorney-client privilege in criminal cases. Indeed, if anything, the reverse is true: such calls as some commentators have sounded for restrictions on the scope of the privilege have been limited to civil cases. See 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5472, at 88 (1986) (some "[s]tudent writers . . . have carried on McCormick's campaign to have the [attorney-client] privilege made conditional rather than absolute, *at least in civil cases*") (citations omitted, emphasis added).

By recognizing a "rather absolute" attorney-client privilege for governmental clients in civil litigation, but declaring that no attorney-client privilege exists at all in criminal cases, the panel majority contravened binding precedent of this Court, the controlling rules of evidence, and the settled consensus of the common law as long understood by courts and scholars alike.

B. The Attorney-Client Privilege Does Not Depend On The Identity Of The Client.

The panel majority's opinion also rests on the assumption that the attorney-client privilege must be justified—and may be questioned anew—with each new client. (See App. 12a). Judge Tatel was obviously correct, however, to observe that "no court has suggested that the attorney-client privilege must be extended client by client to each new governmental entity, proceeding by proceeding." (App. 26a). No case law supports the assumption that the *identity of the client* has any bearing on the existence or scope of the privilege. See 8 WIGMORE, EVIDENCE § 2321 ("the reason of the privilege applies to all clients as such"); cf., *e.g.*, *Grand Jury Subpoena*, 112 F.3d at 927 (Kopf, J., dissenting) ("[l]ike any other client, the White House has an attorney-client privilege in all types of cases"); *Radiant Burners, Inc.* v. *American Gas Ass'n*, 320 F.2d 314, 322 (7th Cir.) (en banc) ("the privilege is that of a 'client' without regard to the non-corporate or corporate character of the client, designed to facilitate the workings of justice"), cert. denied, 375 U.S. 929 (1963). The assumption itself is a harmful one that, unless rejected, can only invite other courts to venture new exceptions to the attorney-client privilege based on the identities of the parties before them. This has never been the law, and the majority cited nothing to justify such a radical reworking of the privilege.

The available case law reflects a consensus that governmental clients, like all other clients, have a legally protected right to confer with counsel in confidence. The principle has been recognized by this Court[6] and by lower federal[7] and state courts.[8] When this

[6] See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975) (FOIA preserves common-law protection for "working papers of the agency attorney and

documents which would come within the attorney-client privilege") (internal quotations and citation omitted).

[7] The decisions of the Court of Appeals for the D.C. Circuit in *Tax Analysts*, *Brinton*, *Coastal States*, and *Mead Data Central* have already been noted. See *supra* at 9. See also, *e.g.*, *Town of Norfolk* v. *U.S. Army Corps of Engineers*, 968 F.2d 1438, 1457–1458 (1st Cir. 1992); *Wright* v. *OSHA*, 822 F.2d 642, 648 (7th Cir. 1987); *Hollar* v. *IRS*, 1997-2 U.S. Tax Cas. (CCH) ¶ 50,783 (D.D.C. 1997); *Camden* v. *Maryland*, 910 F. Supp. 1115, 1118 & n.8 (D. Md. 1996); *Boyer* v. *Board of County Comm'rs*, 162 F.R.D. 687, 689 (D. Kan. 1995); *Metro Wastewater Reclamation Dist.* v. *Continental Cas. Co.*, 142 F.R.D. 471, 476 (D. Colo. 1992); *Texaco, Inc.* v. *Louisiana Land & Exploration Co.*, 805 F. Supp. 385, 387–388 (M.D. La. 1992), appeal dism'd, 995 F.2d 43 (5th Cir. 1993); *RTC* v. *Diamond*, 137 F.R.D. 634, 643 (S.D.N.Y. 1991); *FDIC* v. *Ernst & Whinney*, 137 F.R.D. 14, 16 (E.D. Tenn. 1991); *Covington & Burling* v. *Food & Nutrition Serv.*, 744 F. Supp. 314, 323 (D.D.C. 1990); *FDIC* v. *Cherry, Bekaert & Holland*, 131 F.R.D. 596, 599–600 (M.D. Fla. 1990); *Buford* v. *Holladay*, 133 F.R.D. 487, 492 (S.D. Miss. 1990); *Badran* v. *DOJ*, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987); *United States* v. *Miracle Recreation Equip. Co.*, 118 F.R.D. 100, 107 (S.D. Iowa 1987); *Bruce* v. *Christian*, 113 F.R.D. 554, 560 (S.D.N.Y. 1986); *Donovan* v. *Teamsters Union Local 25*, 103 F.R.D. 550, 552–553 (D. Mass. 1984); *Murphy* v. *TVA*, 571 F. Supp. 502, 506 (D.D.C. 1983); *Green* v. *IRS*, 556 F. Supp. 79, 85–86 (N.D. Ind. 1982), aff'd mem., 734 F.2d 18 (7th Cir. 1984); *SEC* v. *World-Wide Coin Invs., Ltd.*, 92 F.R.D. 65, 66–67 (N.D. Ga. 1981); *Jupiter Painting Contracting Co.* v. *United States*, 87 F.R.D. 593, 598 (E.D. Pa. 1980); *O'Brien* v. *Board of Educ.*, 86 F.R.D. 548, 549 (S.D.N.Y. 1980); *United States* v. *AT&T*, 86 F.R.D. 603, 616–618 (D.D.C. 1979); *Falcone* v. *IRS*, 479 F. Supp. 985, 989 (E.D. Mich. 1979); *Hearn* v. *Rhay*, 68 F.R.D. 574, 579 (E.D. Wash. 1975); *Thill Sec. Corp.* v. *N.Y. Stock Exch.*, 57 F.R.D. 133, 138–139 (E.D. Wis. 1972); *Detroit Screwmatic Co.* v. *United States*, 49 F.R.D. 77, 78 & n.3 (S.D.N.Y. 1970); *United States* v. *Anderson*, 34 F.R.D. 518, 522–523 (D. Colo. 1963); *Connecticut Mut. Life Ins. Co.* v. *Shields*, 18 F.R.D. 448, 450 (S.D.N.Y. 1955).

Although Fed. R. Evid. 1101 makes it clear that the application of the privilege does not turn on the nature of the proceeding in which the evidence is sought, we note that the right of a governmental client to confer with counsel in confidence has also been recognized in grand jury proceedings. See *In re Grand Jury Subpoena*, 886 F.2d 135, 138 (6th Cir. 1989). In *Reed* v. *Baxter*, 134 F.3d 351, 356–357 (6th Cir. 1998), pet. for cert. filed, 66 U.S.L.W. 3790 (U.S. June 3, 1998) (No. 97-1966), a divided Sixth Circuit panel recharacterized its ruling in *In re Grand Jury Subpoena* as assuming, but not explicitly deciding, whether "a governmental entity . . . may invoke the attorney client privilege" because of uncertainty "about which agents of an organizational client are the client for purposes of the attorney-client privilege." The dissenting judge believed this Court's decision in *Upjohn* adequately answered that question. See *id.* at 359–360.

Court promulgated the Federal Rules of Evidence in 1976, it included governmental clients within the scope of the privilege,[9] and similar rules have been adopted by many state legislatures as part of their codes of evidence.[10] Scholarly authorities also recognize that governmental clients, like all clients, need to be able to confer with counsel in confidence.[11]

The ALI's *Restatement (Third) of the Law Governing Lawyers* also recognizes that governmental organizations hold a privilege parallel to that enjoyed by other organizational clients. Section 124 of the *Restatement* provides that "[u]nless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in § 123 [the provision

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[8] See, *e.g.*, *Kobluk* v. *University of Minn.*, 574 N.W.2d 436, 440–444 (Minn. 1998); *Tausz* v. *Clarion-Goldfield Community Sch. Dist.*, 569 N.W.2d 125, 127–128 (Iowa 1997); *Arizona Dep't of Economic Sec.* v. *O'Neil*, 901 P.2d 1226, 1228 (Ariz. Ct. App. 1995); *Sedat, Inc.* v. *Dep't of Envtl. Rsrcs.*, 641 A.2d 1243, 1244 (Pa. Commw. Ct. 1994); *State* v. *Today's Bookstore, Inc.*, 621 N.E.2d 1283, 1288 (Ohio App. 1993); *Mahoney* v. *Staffa*, 585 N.Y.S.2d 543, 544 (N.Y. App. Div. 1992); *Board of Trustees* v. *Morley*, 580 N.E.2d 371, 373–374 (Ind. Ct. App. 1991); *State ex rel. Caryl* v. *MacQueen*, 385 S.E.2d 646, 648–650 (W. Va. 1989); *Hui* v. *Pacarro*, 666 P.2d 177, 183–184 (Haw. Ct. App. 1983). State courts also have specifically recognized the right of a governmental client to assert its attorney-client privilege in grand jury proceedings. See *In re Grand Jury Subpoenas Duces Tecum*, 574 A.2d 449, 453–455 (N.J. Super. Ct. App. Div. 1989).

[9] Proposed Fed. R. Evid. 503(a)(1) defined "client" to include a "public officer . . . or other organization or entity, either public or private." 56 F.R.D. 183, 235.

[10] See, *e.g.*, Ala. R. Evid. 502(a)(1); Alaska R. Evid. 503(a)(1); Ark. R. Evid. 502(a)(1); Cal. Evid. Code § 951 & cmt.; Del. R. Evid. 502(a)(1); Fla. Stat. Ann. § 90.502(1)(b); Idaho R. Evid. 502(a)(1); Ky. R. Evid. 503(a)(1); Miss. R. Evid. 502(a)(1); Neb. Rev. Stat. § 27-503(1)(a); N.H. R. Evid. 502(a)(1); N.M. R. Evid. 11-503(A)(1); N.D. R. Evid. 502(a)(1); 12 Okla. Stat. § 2502(A)(2); Tex. R. Evid. 503(a)(1); Utah R. Evid. 504(a)(1); Vt. R. Evid. 502(a)(1); Wis. Stat. § 905.03(1)(a).

[11] See, *e.g.*, PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:28 (1993) ("When government agencies consult with legal counsel for the purpose of obtaining legal advice or assistance (regardless of whether it be in-house agency counsel, attorneys from the Department of Justice, or outside counsel) the attorney-client privilege protects its communications to those attorneys.").

governing the privilege applicable to organizational clients.]" RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 (Prop. Final Draft No. 1, 1996; approved, 66 U.S.L.W. 2716 (1998)) (hereafter "RESTATEMENT"). The rationale supporting such a privilege, the *Restatement* noted, was the same as for other organizational clients:

> The objectives of the attorney-client privilege, including the special objectives relevant to organizational clients, apply in general to governmental clients. The privilege aids government entities and officers in obtaining legal advice founded on a complete and accurate factual picture. Communications from such agents should be correspondingly privileged.

RESTATEMENT § 124 cmt. b (internal cross-references omitted). This rationale was applicable even against adversaries claiming to act "in what they assert is the public interest." *Ibid.* As the *Restatement* explained:

> The public acting through its public agencies is entitled to resist claims and contentions that the agency considers legally or factually unwarranted.[12] To that end, a public agency or officer is entitled to engage in confidential communications with counsel to establish and maintain legal positions.

Ibid.

Although the panel majority selectively quoted a separate portion of the *Restatement* comment that "[m]ore particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another" (App. 11a), the citation will not bear the weight the panel majority would place on it. The *Restatement*'s call for "more particularized rules" nowhere states or implies support for the majority's wholesale abrogation of the privilege in criminal cases. And even though it opines such particularized rules "may be necessary" in some cases, the *Restatement* recognizes that its comment is, at most, a gloss on

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[12] Indeed, there may be an affirmative *duty* to do so in circumstances such as those presented here. See *infra* at 19.

"the generally prevailing rule that governmental agencies and agents enjoy *the same privilege* as non-governmental counterparts." *Ibid.* (emphasis added).[13] The *Restatement* did not consider the unique circumstances applicable when the President of the United States seeks confidential legal advice, nor did it suggest that "more particularized rules" would compel rescinding the privilege in the context of an institutional confrontation between branches of government.

By declaring that the common-law attorney-client privilege varies in scope depending on the identity of the client asserting it in a particular case, the panel majority unmoored itself from any legal principle whatsoever, rendering a decision the consequences of which currently reach to the boundaries of prosecutorial ingenuity. Fidelity to the core purposes of the attorney-client privilege calls for this Court's decisive rejection of the notion that the identity of the client has any relevance at all to the privilege's settled scope.

C. The Attorney-Client Privilege Does Not Depend On The Content Of The Privileged Communications.

The panel majority also ventured far afield in declaring, for the first time, that the attorney-client privilege protects communications on some subjects but not others. (App. A2 ("The extent to which communications of White House Counsel are privileged against disclosure to a federal grand jury depends, therefore, on whether the communications contain information of possible criminal offenses.")). See generally *supra* at 3 & n.4. So long as a communication is made for a proper purpose (seeking or providing legal advice) and not for an improper purpose (such as in furtherance of a crime or fraud), the common law grants the courts no authority to probe deeper into the content of a communication when ruling on a claim of privilege. And the common law has never adopted the panel majority's holding that attorney-client

[13] See also RICE, *supra* note 11, § 4:28 (cum. supp. 1998) ("the scope of the privilege is generally thought to be the same in the private and governmental context").

communications that "contain information of possible criminal offenses" (App. 2a) are subject to different privilege rules (to wit, no privilege at all) than all other attorney-client communications. The panel majority cited no precedent supporting the content-based test it adopted to carve out a new exception for the attorney-client privilege in this case.[14]

The panel majority's content-based test was its own invention, arrived at essentially without the benefit of briefing on the issue. The OIC did not propose such a test either in the district court or in the court of appeals.

The case on which the OIC relied most heavily below, and on which the district court (but not the court of appeals) principally relied by analogy, adopted no such analysis. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997). In that case, the OIC subpoenaed notes taken by White House attorneys during meetings with the First Lady and her private counsel, concerning an investigation of the First Lady's conduct as a private citizen before the President took office. See *id.* at 913–914. Thus, the question before the court was whether an attorney-client privilege protected communications between White House counsel and the First Lady in her individual capacity. See *Reed* v. *Baxter*, 134 F.3d at 359 (Jones, J., dissenting) (distinguishing Eighth Circuit case on the grounds that it did not involve an attorney-client relationship between the First Lady and White House counsel). The Eighth Circuit nevertheless treated the question before it as "whether a governmental attorney-client privilege" applied, *Grand Jury Subpoena*, 112 F.3d at 915, and concluded

[14] The panel majority also cited nothing to show, or even to suggest, that any of the communications over which Mr. Lindsey actually asserted the attorney-client privilege here "contain[ed] information of possible criminal offenses" and therefore met its standard for disclosure. We are hard pressed to perceive, for example, how the advice Counsel to the President Charles F.C. Ruff, Deputy Counsels Bruce Lindsey and Cheryl Mills, and specially retained counsel W. Neil Eggleston gave to the President concerning whether he should direct the assertion of any official privileges in this very litigation (App. 31a, 32a, 33a) could be held to "contain information of possible criminal offenses." So far as we are aware, it is not a crime for any client, even the President, to discuss with his lawyers whether a testimonial privilege would apply.

that federal government attorneys could never assert an attorney-client privilege in federal criminal proceedings. See *id.* at 917–918. The Eighth Circuit majority reached this conclusion without suggesting that the content of the communications was relevant to the inquiry in any way. Although the Eighth Circuit majority reached the same ultimate conclusion as the panel majority in this case,[15] it supplied absolutely no support for the majority's conclusion here that governmental clients may, or may not, hold an attorney-client privilege in criminal cases depending on the content of their discussions with counsel.

II.
THE PANEL MAJORITY'S RULING UPSETS THE CONSTITUTIONAL BALANCE OF POWERS

A second critical flaw in the panel majority's opinion is its failure to appreciate the unique factual and legal context in which this case arises. The Independent Counsel is no ordinary federal prosecutor—he is, by law, a designated investigator for Congress. He has been commanded to refer any evidence of potentially impeachable offenses directly to Congress. 28 U.S.C. § 595(c). This Independent Counsel already has announced to this Court his intent to issue just such a referral. OIC's Redacted Reply Br. at 2, *United States* v. *Clinton*, No. 97-1924 (requesting certiorari before judgment on grounds that "possible reports for impeachment proceedings" needed to be issued "as quickly as possible").

Thus, we stand now upon the brink of the most serious confrontation between branches of government contemplated in our

[15] And, we hasten to add, committed the same errors. Compare *id.* at 917–918 (recognizing attorney-client privilege of governmental clients in civil litigation, but declaring that "the criminal context . . . presents a rather different issue") with *Swidler & Berlin*, 118 S. Ct. at 2087 ("there is no case authority for the proposition that the privilege applies differently in criminal and civil cases"). See also RICE, *supra* note 11, § 4:28 (cum. supp. 1998) (criticizing the Eighth Circuit's "unprecedented" decision and concluding: "[t]he U.S. government is the largest employer in the world. Its agency structures and problems are as complex as those of any private enterprise. To the extent that the protection of the privilege is justified in any corporate context, the need within the government is equal, if not greater").

constitutional order. The President's need for confidential consultations with White House counsel in preparation for proceedings designed to remove him from office can scarcely be questioned. Yet the panel majority's opinion prevents precisely such consultations from occurring. The judicial branch has, accordingly, imposed serious constraints on the executive branch's power to defend itself in proceedings before the legislative branch. And it has done so without offering a persuasive justification for such a result.

Impeachment is an official government proceeding, expressly provided for in the Constitution, that can be directed only against a public officer. See U.S. CONST. Art. II, § 4. The Constitution refers to impeachment proceedings as "trials," and historical precedent suggests that they have indeed been conducted essentially as adversarial proceedings. See generally WILLIAM H. REHNQUIST, GRAND INQUESTS (1992) (reviewing impeachment trials of Justice Samuel Chase and President Andrew Johnson). Thus, as with any other trial, a public officer who is a party to an impeachment proceeding has a compelling need—and right—to the assistance of counsel in his or her defense.[16]

Further, at least in the context of the Presidency, a defense against impeachment is not merely a private function of an individual; it is an official constitutional duty of the President. See Letter from Elmer B. Staats, U.S. Comptroller General, to Rep. John F. Seiberling, Oct. 25, 1974 (No. B-133209), at 7 ("a President who sincerely believes in his innocence has an obligation under his constitutional oath of office to defend himself against impeachment"). In furtherance of this official duty, as in all other official duties, a President must rely on the assistance of White House counsel.

In these proceedings, the Independent Counsel acts as Congress' surrogate, bound by law to report to Congress "any substantial and credible evidence . . . that may constitute grounds for an

[16] Thus, for example, President Nixon was represented in impeachment-related proceedings, both before the courts and in Congress, by James St. Clair, who had for that purpose been appointed a member of the White House Counsel's office and who was properly paid with federal funds.

impeachment." 28 U.S.C. § 595(c). That fact alters the calculus in ways the panel majority simply failed to consider. If the Independent Counsel can use the grand jury's investigatory power to gather evidence for Congress, Congress can evade what would otherwise be the privilege protecting the executive branch's confidential attorney-client communications against legislative intrusion.[17] Allowing such an end-run around the attorney-client privilege will therefore carry consequences far beyond the criminal investigatory context to which the majority purported to limit its holding, and will instead pose serious separation of powers concerns.

As the Attorney General argued before the court of appeals, "communications between the President and [White House] counsel with respect to [impeachment] proceedings *would be absolutely privileged against discovery by the House of Representatives or the Senate*." Brief *Amicus Curiae* For the United States, Acting Through the Attorney General, at 34, *In re Lindsey*, No. 98-3060 (D.C. Cir. July 27, 1998) (emphasis added). This result is clearly contemplated under the available case law, which recognizes that the Executive may lawfully withhold certain privileged communications from Congress even when such communications would properly be discoverable in judicial proceedings. Compare, *e.g.*, *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (legislative committee may not compel production of Nixon tapes) with *Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (Nixon must produce tapes in response to grand jury subpoena). The panel majority did not dispute that the scope of applicable evidentiary privileges in proceedings before Congress would differ from that in judicial proceedings.

The panel majority dismissed these difficulties offhandedly, suggesting that impeachment is a political process, that the role of White House Counsel in that process is of uncertain dimensions, that Congress may decide to reject the President's claim of official

[17] This concern is not merely theoretical. Published reports have already indicated that the OIC intends to submit confidential grand jury material to Congress, forcing discussions in the House of Representatives about how to deal with such materials. See Susan Schmidt & Juliet Eilperin, *Starr Report May Be Limited to Lewinsky Case*, WASH. POST, Aug. 12, 1998, at A1, A6.

attorney-client privilege, and that, in any event, disputes arising in the course of impeachment may not be justiciable. If it believes that a President's assertion of the attorney-client privilege is unlawful, Congress has available to it a complete remedy in the form of impeachment. But it may not simply delegate to an inferior executive officer the power to invade the President's confidences and then report back to Congress. By failing to recognize the constitutional implications of the Independent Counsel's adversarial function and granting him unilateral authority to override the President's privilege claims, the panel majority has, in effect, decided the very issue it purported to leave unresolved. The majority has granted the Independent Counsel the unfettered power to secure from the President and turn over to the Congress his privileged communications, which even the majority acknowledges Congress either might not be able to obtain or might not choose to seek.

The panel majority also failed to recognize the dubious constitutionality of the Independent Counsel statute if given the reading the majority appears to adopt. In *Morrison* v. *Olson*, 487 U.S. 654 (1988), this Court upheld the constitutionality of the Independent Counsel statute against a separation of powers argument because it concluded that, although some executive functions were being exercised by the Special Division, the President retained control over the Independent Counsel through the removal power; and because Congress had not sought to increase its own power under the statute.

While making reference to section 595(c), *Morrison* v. *Olson* did not consider the circumstances present here: this Independent Counsel has publicly declared that a likely outcome of the current grand jury investigation is a referral to Congress "for impeachment proceedings" under 28 U.S.C. § 595(c). As Justice Scalia recognized in dissent in *Morrison*, "this statute is acrid with the smell of impeachment." 487 U.S. at 702. It is one thing for the Independent Counsel to conduct an investigation, and determine at the conclusion whether "reports for impeachment proceedings issue[]"; it is quite another for the Independent Counsel to be using the grand jury to gather evidence for Congress. Yet, in the face of these separation-of-powers concerns, the Independent Counsel is seeking to question the very attorneys who would represent the President in

the Congressional process. Because the panel majority entirely failed to recognize these separation of powers concerns, this case warrants review by this Court.

III.
THE PANEL MAJORITY'S RULING GROSSLY INFLATES THE POWERS OF THE INDEPENDENT COUNSEL

The majority's view turns the constitutional structure of the Executive Branch on its head by allowing an inferior officer of the government to compel a superior officer in the constitutional hierarchy to disclose his confidential communications with counsel.

Article II of the Constitution vests in the President all of the powers and responsibilities of the executive branch. Under the Ethics in Government Act, the Independent Counsel is an inferior officer of that branch, vested with many of the powers of the Attorney General—an officer of the executive branch appointed by and subordinate to the President. 28 U.S.C. § 594(a); *Morrison*, 487 U.S. at 670–672. Among the Attorney General's powers, as the prosecutor of federal crimes and as counsel for the United States in civil litigation, is the right in *most* cases to determine whether the assertion of attorney-client privilege by a subordinate executive official, such as an agency head, will be honored. In the case of the Office of the President, however, she does not have the right to exercise that power because that office is headed by the only person in the executive branch who is her superior. As the Attorney General's *amicus* brief below made clear, the President is the ultimate authority in this arena; he can overrule the Attorney General's decision in the event of a dispute with an agency head and he can deny her request for access to privileged information in the possession of the Office of the President. The President may suffer adverse political consequences from the decision to do so, but no one could plausibly contend that he lacked the authority.

As the panel majority erroneously sees it, however, the Independent Counsel holds *more* power than the Attorney General—for, unlike the Attorney General, he may compel the disclosure of communications from a superior officer in the executive branch hierarchy. The panel majority ruled that the Independent Counsel, as

the manager of the grand jury investigation, may demand information from the Office of the President that is, on its face, clearly protected by the attorney-client privilege, and the President is powerless to refuse—or even to seek judicial review of the justification for the OIC's demand. Under the majority's holding, the Independent Counsel is vested with unilateral, unreviewable authority to determine where the balance of societal and constitutional interests should be struck. Contra *Morrison*, 487 U.S. at 671 (Independent Counsel's authority "does not include any authority to formulate policy for the Government or the Executive Branch"). If the majority opinion is allowed to stand, Judge Silberman's vision of the Independent Counsel as the sole embodiment of the legal authority of the United States, *In re Sealed Case*, 146 F.3d 1031 (D.C. Cir. 1998) (Silberman, J., concurring in denial of rehearing in banc), has truly become reality, for that decision makes the President the inferior officer.

When the President is the target of its investigation, the OIC is adverse to the President in his *official*, as well as his personal, capacity. The OIC's powers include the authority to seek remedies that affect the both the presidency as an institution and the President as an individual. The OIC has both the power to trigger a constitutional process that could result in the President's removal from office and the power, after removal, to prosecute him. In this setting, the President must have the right to protect his official status by all legitimate means.

Of course, such a right is not unlimited. Most importantly, as history so plainly demonstrates, the realities of the political process constrain the President's ability to exercise even the legal rights he does enjoy. But he should not, as the majority below would have it, be deprived of his right to maintain the absolute confidentiality of his communications with his official counsel—a right he would have against *every other opponent*—when the one adversary who is empowered to challenge his right to hold his constitutional office demands their disclosure.

Even if the panel majority believed that it is not seemly for the President's official counsel to assert the attorney-client privilege when called upon by the Independent Counsel to testify against the

President,[18] such concerns provide absolutely no legal basis for forging an exception to a privilege recognized to exist in every other relevant context. Even if the panel majority were correct as a matter of moral theory, the judicial branch may not impose its perception of official morality on the executive unless that perception is rooted in the law—and the majority cites no law, common or statutory, that would support its holding. If Congress believes that the President is acting improperly in refusing to divulge his conversations with his counsel, they may choose to exercise their constitutional authority under Article I, §§ 2 and 3; if the people believe that the President is acting improperly, their voice, too, will be heard. Those are considerations the President must weigh in making the decision to assert his privilege, but he should not have that decision made for him by another branch of government—much less by an inferior officer of his own branch. The panel majority's contrary declaration is utterly devoid of precedential support and violates the constitutional structure that makes the President, not the Independent Counsel, the head of the executive branch.

IV.
THE PANEL MAJORITY'S RULING IS CONTRARY TO THE PUBLIC INTEREST

In reaching its erroneous result, the panel majority entirely discounted the public interests the attorney-client privilege has long been recognized to advance. By providing the assurance of confidentiality, the privilege encourages clients to make full disclosure to their attorneys—disclosures that often would not be made if the client believed the lawyer might later be compelled to disclose the communication. See *Upjohn*, 449 U.S. at 389. Such disclosure is crucial to the attorney's professional mission, for legal advice that is accurate enough to be useful can rest only on the attorney's complete understanding of the facts. See *ibid.* Inaccurate advice, such as necessarily will result from an attorney's incomplete appreciation of the client's situation, is little better than no advice at all, and can compound the client's legal problems by inducing the client to take ill-considered steps. Because belief in confidentiality encourages the full client disclosure that is the *sine qua non* of accurate legal advice, the privilege "'promote[s the] public interests in the observance of law and the administration of justice.'" *Ibid.* The majority opinion nowhere disputes the historical and beneficial function of the privilege in encouraging law-abiding behavior.

[18] "[R]eason and experience, duty, and tradition dictate that the attorney shall provide that evidence." (App. 12a).

The majority opinion unceremoniously strips these benefits from the public and from their elected representative. By preventing the privilege from attaching to the President's communications with White House counsel, the panel majority removes the incentive for such communications to occur in the first place. The privilege rests on the assumption that those who are not assured of confidentiality will speak differently—and speak less. See *Swidler & Berlin*, 118 S. Ct. at 2086–2087. Nor is this disincentive mitigated by the fact that the majority purports to erase the privilege only in the context of grand jury proceedings, while arguably leaving it intact in other types of cases. The President, like any other client, "may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter[.]" *Id.* at 2087. By introducing uncertainty into the calculus, the majority's decision ensures that Presidents will simply make fewer disclosures to their official counsel. Counsel's advice will inevitably lack the necessary factual foundation, and Presidents will receive correspondingly poor advice. The majority opinion can, in the end, have only one effect, and a pernicious one: it will cause Presidents to take ill-informed actions and, through inadvertence or otherwise, perhaps run afoul of the law more frequently. This is a profound disservice to the public the President is sworn to serve and in whose name the majority claimed to act in striking down the privilege.

A. The Opinion Creates A Perverse Incentive For Government Officials To Rely On Private Counsel For Confidential Legal Advice On Official Matters.

The panel majority had no answer to Judge Tatel's troubling prediction about the effect the majority's decision will have on the

operations of government. Judge Tatel foresaw what amounts to the forced privatization of legal advice within the government—an effect that will inevitably flow from the majority's holding that officials may not confer in confidence with agency counsel. (See App. 26a ("Presidents may well shift their trust on all but the most routine legal matters from White House counsel, who undertake to serve the Presidency, to private counsel who represent its occupant"), 31a). The majority's decision creates a powerful incentive for public officials not to discuss official, but sensitive, government matters with agency counsel, because it can never be known whether a prosecutor might later become interested in the communication. Indeed, government counsel may have an obligation to advise agency personnel not to discuss certain matters with anyone except their private counsel. Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(d).

It is no answer to say, as the panel majority did, that the President may merely retain private counsel if he wishes to communicate in confidence. (App. 20a). Private counsel have an important and legitimate function in advising Mr. Clinton in his individual capacity, and we in no way intend to minimize the functions they have performed, to the advantage of the President and the Nation in these proceedings. But private counsel are just that—*private*. They have, and can have, no official role. They do not speak for the United States. They are neither able nor authorized to advise the President on what course of action is best for the institution of the Presidency, for the Executive branch, or for the Nation as a whole. They have taken no oath and owe no allegiance to the institutions of governance. (See App. 13a n.3 ("private attorneys cannot take official actions")). In the event of a conflict between the interests of the President as an individual and the interests of the presidency as an institution, their loyalty is, and must be, with their individual client.

But the President has an official as well an individual role. And his need to consult with counsel is, at a minimum, no less important in that capacity than in his individual capacity. Despite the President's need for accurate legal advice in connection with his official duties, however, the panel majority has essentially decreed that he shall not receive it, because it has stripped away the guarantee of confidentiality on which the entire edifice of the privilege rests. This is a profound disservice to the public and to the institution of the Presidency.

Even apart from the distinct ethical duties of private counsel—to represent zealously the individual who retains them—numerous other problems, nowhere recognized in the panel majority's opinion, present themselves. Private counsel would inevitably lack the expertise and familiarity with the agency's operation and functions that agency counsel would naturally obtain over the course of a sustained attorney-client relationship. In especially sensitive cases, which occur regularly for counsel representing the White House, the client agency or official may be barred by law or by other considerations of the public interest from disclosing all relevant facts to a private attorney. For both of these reasons, private counsel, even assuming the financial wherewithal exists to retain them, would labor under significant disadvantages not imposed on official counsel. The quality of legal advice to government agencies would necessarily suffer.

B. The Confusion And Differing Standards Among The Various Courts Of Appeals Warrant A Grant Of Certiorari Here.

Review by this Court is also strongly warranted because of the disparate analysis of the attorney-client privilege of a governmental client by nearly every judge who has addressed the issue. On that question, both the panel majority and the dissenting judge approached the question differently from the district judge, differently from the Eighth Circuit, and differently from the Attorney General, who in her *amicus curiae* brief rejected every single one of the OIC's arguments and strongly supported the existence of a robust attorney-client privilege for the President. At least *five* separate interpretations of the attorney-client privilege available to a governmental client in a federal grand jury investigation have now been adopted by the judges who have opined on the question and by the Attorney General. In descending order of protection for client confidences, the privileges that have been suggested are as follows:

Proponent	*Proposed Privilege*
D.C. Circuit dissent	Absolute
The Attorney General	Absolute in impeachment proceedings; qualified in judicial proceedings, but under heightened "essential to justice" standard
8th Circuit dissent, and the district court in this case	Qualified, under same standard as presidential communications privilege
D.C. Circuit majority	No privilege if communications contain information of possible criminal offenses
8th Circuit majority	No privilege for any communications

The fact that no two courts have been able to agree on a common analysis of the privilege, that no court has been able to muster a unanimous panel, and that the Attorney General has taken a position different from every judge to have addressed the question, all tellingly illustrate the extent of the conflict over this important question of federal law. Especially where the decision of the court below conflicts with this Court's most recent pronouncement on the privilege and with centuries of settled law holding the privilege absolute, these differing analyses strongly support final and definitive resolution by this Court of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1998

In re: Bruce R. Lindsey (Grand Jury Testimony)

Nos. 98-3060, 98-3062 and 98-3072

United States Court of Appeals,
District of Columbia Circuit.

Argued June 29, 1998.

Decided July 27, 1998.

Appeals from the United States District Court
for the District of Columbia
(No. 98ms00095).

W. Neil Eggleston argued the cause for appellant the Office of the President, with whom *Timothy K. Armstrong*, *Julie K. Brof* and *Charles F.C. Ruff*, Counsel to the President, were on the briefs.

David E. Kendall argued the cause for appellant William J. Clinton, with whom *Nicole K. Seligman*, *Max Stier*, *Robert S. Bennett*, *Carl S. Rauh*, *Amy Sabrin* and *Katharine S. Sexton* were on the briefs.

Douglas N. Letter, Attorney, U.S. Department of Justice, argued the cause for amicus curiae the Attorney General, with whom *Janet Reno*, Attorney General, *Frank W. Hunger*, Assistant Attorney General, *Stephen W. Preston*, Deputy Assistant Attorney General, and *Stephanie R. Marcus*, Attorney, were on the brief.

Kenneth W. Starr, Independent Counsel and *Brett M. Kavanaugh*, Associate Independent Counsel, argued the causes for appellee the United States, with whom *Joseph M. Ditkoff*, Associate Independent Counsel, was on the brief.

Before: RANDOLPH, ROGERS and TATEL, *Circuit Judges*.

Opinion for the Court filed *PER CURIAM*.

Opinion dissenting from Part II and concurring in part and dissenting in part from Part III filed by *Circuit Judge* TATEL.

PER CURIAM: In these expedited appeals, the principal question is whether an attorney in the Office of the President, having been called before a federal grand jury, may refuse, on the basis of a government attorney-client privilege, to answer questions about possible criminal conduct by government officials and others. To state the question is to suggest the answer, for the Office of the President is a part of the federal government, consisting of government employees doing government business, and neither legal authority nor policy nor experience suggests that a federal government entity can maintain the ordinary common law attorney-client privilege to withhold information relating to a federal criminal offense. The Supreme Court and this court have held that even the constitutionally based executive privilege for presidential communications fundamental to the operation of the government can be overcome upon a proper showing of need for the evidence in criminal trials and in grand jury proceedings. *See United States v. Nixon*, 418 U.S. 683, 707–12 (1974); *In re Sealed Case (Espy)*, 121 F.3d 729, 736–38 (D.C. Cir. 1997). In the context of federal criminal investigations and trials, there is no basis for treating legal advice differently from any other advice the Office of the President receives in performing its constitutional functions. The public interest in honest government and in exposing wrongdoing by government officials, as well as the tradition and practice, acknowledged by the Office of the President and by former White House Counsel, of government lawyers reporting evidence of federal criminal offenses whenever such evidence comes to them, lead to the conclusion that a government attorney may not invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime. The extent to which the communications of White House Counsel are privileged against disclosure to a federal grand jury depends, therefore, on whether the communications contain information of possible criminal offenses. Additional protection may flow from executive privilege [[ ]].*

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* Double brackets signify sealed material.

I.

On January 16, 1998, at the request of the Attorney General, the Division for the Purpose of Appointing Independent Counsels issued an order expanding the prosecutorial jurisdiction of Independent Counsel Kenneth W. Starr. Previously, the main focus of Independent Counsel Starr's inquiry had been on financial transactions involving President Clinton when he was Governor of Arkansas, known popularly as the Whitewater inquiry. The order now authorized Starr to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law" in connection with the civil lawsuit against the President of the United States filed by Paula Jones. *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 497–98 (D.C. Cir.), *petition for cert. filed*, 66 U.S.L.W. 3790 (U.S. June 3, 1998) (No. 97-1959) (quoting order). "Thereafter, a grand jury here began receiving evidence about Monica Lewinsky and President Clinton, and others . . . ." *Id.* at 498.

On January 30, 1998, the grand jury issued a subpoena to Bruce R. Lindsey, an attorney admitted to practice in Arkansas. Lindsey currently holds two positions: Deputy White House Counsel and Assistant to the President. On February 18, February 19, and March 12, 1998, Lindsey appeared before the grand jury and declined to answer certain questions on the ground that the questions represented information protected from disclosure by a government attorney-client privilege applicable to Lindsey's communications with the President as Deputy White House Counsel, as well as by executive privilege, and [[ ]]. Lindsey also claimed work product protections related to the attorney-client privilege [[ ]].

On March 6, 1998, the Independent Counsel moved to compel Lindsey's testimony. The district court granted that motion on May 4, 1998. The court concluded that the President's executive privilege claim failed in light of the Independent Counsel's showing of need and unavailability. *See In re Sealed Case (Espy)*, 121 F.3d at 754. It rejected Lindsey's government attorney-client privilege claim on similar grounds, ruling that the President possesses an attorney-client privilege when consulting in his official capacity

with White House Counsel, but that the privilege is qualified in the grand jury context and may be overcome upon a sufficient showing of need for the subpoenaed communications and unavailability from other sources. [[ ]].

[[ ]] the Office of the President [[ ]] appealed the order granting the motion to compel Lindsey's testimony, challenging the district court's construction of both the government attorney-client privilege and [[ ]]. The Independent Counsel then petitioned the Supreme Court to review the district court's decision on those issues, among others, before judgment by this court. On June 4, 1998, the Supreme Court denied certiorari, while indicating its expectation that "the Court of Appeals will proceed expeditiously to decide this case." *United States v. Clinton*, 118 S. Ct. 2079 (1998). Following an expedited briefing schedule, on June 29, 1998, this court heard argument on the attorney-client issues. Neither the Office of the President nor the President in his personal capacity has appealed the district court's ruling on executive privilege. In Part II we address the availability of the government attorney-client privilege; [[ ]].

II.

The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services. *See In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984). It "is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, No. 97-1192, 1998 WL 333019, at *3 (U.S. June 25, 1998).

The Office of the President contends that Lindsey's communications with the President and others in the White House should fall within this privilege both because the President, like any private person, needs to communicate fully and frankly with his legal advisors, and because the current grand jury investigation may lead to impeachment proceedings, which would require a defense of the President's official position as head of the executive branch of government, presumably with the assistance of White House Counsel. The Independent Counsel contends that an absolute government attorney-client privilege would be inconsistent with the

proper role of the government lawyer and that the President should rely only on his private lawyers for fully confidential counsel.

Federal courts are given the authority to recognize privilege claims by Rule 501 of the Federal Rules of Evidence, which provides that

> [e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. EVID. 501. Although Rule 501 manifests a congressional desire to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis, *see Trammel v. United States*, 445 U.S. 40, 47 (1980), the Supreme Court has been "disinclined to exercise this authority expansively," *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990). "[T]hese exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*, 418 U.S. at 710; *see also Trammel*, 445 U.S. at 50. Consequently, federal courts do not recognize evidentiary privileges unless doing so "promotes sufficiently important interests to outweigh the need for probative evidence." *Id.* at 51.

The Supreme Court has not articulated a precise test to apply to the recognition of a privilege, but it has "placed considerable weight upon federal and state precedent," *In re Sealed Case (Secret Service)*, No. 98-3069, 1998 WL 370584, at *3 (D.C. Cir. July 7, 1998), and on the existence of "a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *Trammel*, 445 U.S. at 50 (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting))). That public good should be shown "with a high degree of clarity and certainty." *In re Sealed Case (Secret Service)*, 1998 WL 370584, at *4.

A.

Courts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts. Much of the law on this subject has developed in litigation about exemption five of the Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552(b)(5) (1994). Under that exemption, "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are excused from mandatory disclosure to the public. *Id.*; *see also* S. REP. NO. 89-813, at 2 (1965) (including within exemption five "documents which would come within the attorney-client privilege if applied to private parties"). We have recognized that "Exemption 5 protects, as a general rule, materials which would be protected under the attorney-client privilege." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997); *see also Brinton v. Department of State*, 636 F.2d 600, 603–04 (D.C. Cir. 1980). In Lindsey's case, his client—to the extent he provided legal services—would be the Office of the President.[1]

Exemption five does not itself create a government attorney-client privilege. Rather, "Congress intended that agencies should not lose the protection traditionally afforded through the evidentiary privileges simply because of the passage of the FOIA." *Coastal States*, 617 F.2d at 862. In discussing the government attorney-client privilege applicable to exemption five, we have mentioned the usual advantages:

> the attorney-client privilege has a proper role to play in exemption five cases. . . . In order to ensure that a client receives the best possible legal advice, based on a full and frank discussion with his attorney, the attorney-client privilege assures him that confidential communications to his attorney will not be disclosed without his consent. We see no reason why this same

[1] [[ ]]

> protection should not be extended to an agency's communications with its attorneys under exemption five.

Mead Data Cent., Inc. v. United States Dep't of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977). Thus, when "the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors," exemption five applies. *Coastal States*, 617 F.2d at 863.

Furthermore, the proposed (but never enacted) Federal Rules of Evidence concerning privileges, to which courts have turned as evidence of common law practices, *see, e.g., United States v. Gillock*, 445 U.S. 360, 367–68 (1980); *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994); *Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Corp.*, 5 F.3d 1508, 1514 (D.C. Cir. 1993); *United States v. (Under Seal)*, 748 F.2d 871, 874 n.5 (4th Cir. 1984); *United States v. Mackey*, 405 F. Supp. 854, 858 (E.D.N.Y. 1975), recognized a place for a government attorney-client privilege. Proposed Rule 503 defined "client" for the purposes of the attorney-client privilege to include "a person, public officer, or corporation, association, or other organization or entity, either public or private." PROPOSED FED. R. EVID. 503(a)(1), *reprinted in* 56 F.R.D. 183, 235 (1972). The commentary to the proposed rule explained that "[t]he definition of 'client' includes governmental bodies." *Id.* advisory committee's note. The Restatement also extends attorney-client privilege to government entities. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 (Proposed Final Draft No. 1, 1996) [hereinafter RESTATEMENT].

The practice of attorneys in the executive branch reflects the common understanding that a government attorney-client privilege functions in at least some contexts. The Office of Legal Counsel in the Department of Justice concluded in 1982 that

> [a]lthough the attorney-client privilege traditionally has been recognized in the context of private attorney-client relationships, the privilege also functions to

> protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA, much as it operates to protect attorney-client communications in the private sector.

Theodore B. Olsen, Assistant Attorney General, Office of Legal Counsel, *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. Off. Legal Counsel 481, 495 (1982). The Office of Legal Counsel also concluded that when government attorneys stand in the shoes of private counsel, representing federal employees sued in their individual capacities, confidential communications between attorney and client are privileged. *See* Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee* (Nov. 30, 1976); Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Duty of Government Lawyer Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship with Another Government Employee* (Mar. 29, 1985); *see also* 28 C.F.R. § 50.15(a)(3) (1998).

B.

Recognizing that a government attorney-client privilege exists is one thing. Finding that the Office of the President is entitled to assert it here is quite another.

It is settled law that the party claiming the privilege bears the burden of proving that the communications are protected. As oft-cited definitions of the privilege make clear, only communications that seek "legal advice" from "a professional legal adviser in his capacity as such" are protected. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (McNaughton rev. 1961). Or, in a formulation we have adopted, the privilege applies only if the person to whom the communication was made is "a member of the bar of a court" who "in connection with th[e] communication is acting as a lawyer" and the communication was made "for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding." *In re Sealed Case*, 737 F.2d at 98–99

(quoting *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358–59 (D.Mass.1950)).

On the record before us, it seems likely that at least some of the conversations for which Lindsey asserted government attorney-client privilege did not come within the formulation just quoted. [[ ]]. Both of these subjects arose from the expanded jurisdiction of the Independent Counsel, which did not become public until January 20, 1998. Before then, any legal advice Lindsey rendered in connection with *Jones v. Clinton*, a lawsuit involving President Clinton in his personal capacity, likely could not have been covered by government attorney-client privilege.[2] [[ ]]. According to the Restatement, "consultation with one admitted to the bar but not in that other person's role as lawyer is not protected." RESTATEMENT § 122 cmt. c. "[W]here one consults an attorney not as a lawyer but as a friend or as a business adviser or banker, or negotiator . . . the consultation is not professional nor the statement privileged." 1 MCCORMICK ON EVIDENCE § 88, at 322–24 (4th ed. 1992) (footnotes omitted). Thus Lindsey's advice on political, strategic, or policy issues, valuable as it may have been, would not be shielded from disclosure by the attorney-client privilege.

As for conversations after January 20th, the Office of the President must "present the underlying facts demonstrating the existence of the privilege" in order to carry its burden. *See FTC v. Shaffner*, 626 F.2d 32, 37 (7th Cir.1980). A blanket assertion of the privilege will not suffice. Rather, "[t]he proponent must conclusively prove each element of the privilege." *SEC v. Gulf & Western Indus.*, 518 F. Supp. 675, 682 (D.D.C. 1981). In response to the Independent Counsel's questions, Lindsey invariably asserted executive privilege and attorney-client privilege. On this record, it is impossible to determine whether Lindsey believed that both privileges applied or whether he meant to invoke them on an "either/or" basis. As we have said, the district court's rejection of the executive privilege claim has not been appealed. With this

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[2] We do not foreclose a showing by Lindsey when he appears again before the grand jury that prior to January 20, 1998, he gave legal advice as Deputy White House Counsel in regard to how private litigation involving the President was affecting the Office of the President.

privilege out of the picture, the Office of the President had to show that Lindsey's conversations "concerned the seeking of legal advice" and were between President Clinton and Lindsey or between others in the White House and Lindsey while Lindsey was "acting in his professional capacity" as an attorney. *Shaffner*, 626 F.2d at 37.

With regard to most of the communications that were the subject of questions before the grand jury, it does not appear to us that any such showing was made in the grand jury by Lindsey or in the district court by the Office of the President in the proceedings leading to the order to compel his testimony. This may be attributable to the parties' focus in the district court. The arguments on both sides centered on whether any attorney-client privilege protected the conversations about which Lindsey was asked, not on whether—if the privilege could be invoked—the conversations were covered by it. In light of this, and in view of the Administration's abandonment of its executive privilege claim, Lindsey would have to return to the grand jury no matter how we ruled on the government attorney-client privilege claim.

There is, however, no good reason for withholding decision on the issues now before us. We have little doubt that at least *one* of Lindsey's conversations subject to grand jury questioning "concerned the seeking of legal advice" and was between President Clinton and Lindsey or between others in the White House and Lindsey while Lindsey was "acting in his professional capacity" as an attorney. *See id.* [[ ]]. The issue whether the government attorney-client privilege could be invoked in these circumstances is therefore ripe for decision.

Moreover, the case has been fully briefed and argued. The Supreme Court has asked us to expedite our disposition of these appeals. Sending this case back for still another round of grand jury testimony, assertions of privileges and immunities, a district court judgment, and then another appeal would be inconsistent with the Supreme Court's request and would do nothing but prolong the grand jury's investigation. The parties, we believe, are entitled now to a ruling to govern Lindsey's future grand jury appearance.

We therefore turn to the question whether an attorney-client privilege permits a government lawyer to withhold from a grand jury information relating to the commission of possible crimes by government officials and others. Although the cases decided under FOIA recognize a government attorney-client privilege that is rather absolute in civil litigation, those cases do not necessarily control the application of the privilege here. The grand jury, a constitutional body established in the Bill of Rights, "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people," *United States v. Williams*, 504 U.S. 36, 47 (1992), while the Independent Counsel is by statute an officer of the executive branch representing the United States. For matters within his jurisdiction, the Independent Counsel acts in the role of the Attorney General as the country's chief law enforcement officer. *See* 28 U.S.C. § 594(a) (1994). Thus, although the traditional privilege between attorneys and clients shields private relationships from inquiry in either civil litigation or criminal prosecution, competing values arise when the Office of the President resists demands for information from a federal grand jury and the nation's chief law enforcement officer. As the drafters of the Restatement recognized, "More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved." RESTATEMENT § 124 cmt. b. For these reasons, others have agreed that such "considerations" counsel against "expansion of the privilege to all governmental entities" in all cases. 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5475, at 125 (1986).

The question whether a government attorney-client privilege applies in the federal grand jury context is one of first impression in this circuit, and the parties dispute the import of the lack of binding authority. The Office of the President contends that, upon recognizing a government attorney-client privilege, the court should find an *exception* in the grand jury context only if practice and policy require. To the contrary, the Independent Counsel contends, in essence, that the justification for any *extension* of a gov-

ernment attorney-client privilege to this context needs to be clear. These differences in approach are not simply semantical: they represent different versions of what is the status quo. To argue about an "exception" presupposes that the privilege otherwise applies in the federal grand jury context; to argue about an "extension" presupposes the opposite. In *Swidler & Berlin*, the Supreme Court considered whether, as the Independent Counsel contended, it should create an exception to the personal attorney-client privilege allowing disclosure of confidences after the client's death. *See Swidler & Berlin*, 1998 WL 333019, at *2. After finding that the Independent Counsel was asking the Court "not simply to 'construe' the privilege, but to narrow it, contrary to the weight of the existing body of caselaw," the Court concluded that the Independent Counsel had not made a sufficient showing to warrant the creation of such an exception to the settled rule. *Id.* at *7.

In the instant case, by contrast, there is no such existing body of caselaw upon which to rely and no clear principle that the government attorney-client privilege has as broad a scope as its personal counterpart. Because the "attorney-client privilege must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle,'" *In re Sealed Case*, 676 F.2d 793, 807 n.44 (D.C. Cir. 1982) (quoting *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979)); *accord Trammel*, 445 U.S. at 50, and because the government attorney-client privilege is not recognized in the same way as the personal attorney-client privilege addressed in *Swidler & Berlin*, we believe this case poses the question whether, in the first instance, the privilege extends as far as the Office of the President would like. In other words, pursuant to our authority and duty under Rule 501 of the Federal Rules of Evidence to interpret privileges "in light of reason and experience," FED. R. EVID. 501, we view our exercise as one in defining the particular contours of the government attorney-client privilege.

When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far

different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. The constitutional responsibility of the President, and all members of the Executive Branch, is to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. Investigation and prosecution of federal crimes is one of the most important and essential functions within that constitutional responsibility. Each of our Presidents has, in the words of the Constitution, sworn that he "will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." *Id.* art. II, § 1, cl. 8. And for more than two hundred years each officer of the Executive Branch has been bound by oath or affirmation to do the same. *See id.* art. VI, cl. 3; *see also* 28 U.S.C. § 544 (1994). This is a solemn undertaking, a binding of the person to the cause of constitutional government, an expression of the individual's allegiance to the principles embodied in that document. Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.[3]

The oath's significance is underscored by other evocations of the ethical duties of government lawyers.[4] The Professional Ethics

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[3] We recognize, as our dissenting colleague emphasizes, that every lawyer must take an oath to enter the bar of any court. But even after entering the bar, a government attorney must take another oath to enter into government service; that in itself shows the separate meaning of the government attorney's oath. Moreover, the oath is significant to our analysis only to the extent that it underlies the fundamental differences in the roles of government and private attorneys—of particular note, the fact that private attorneys cannot take official actions.

[4] Indeed, the responsibilities of government lawyers to the public have long governed the actions they can take on behalf of their "client":

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). In keeping with these interests, prosecutors must disclose to the defendant exculpatory evidence, *see Brady v. Maryland*, 373 U.S. 83, 87 (1963), and must try to "seek justice, not merely to convict," MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980).

Committee of the Federal Bar Association has described the public trust of the federally employed lawyer as follows:

> [T]he government, over-all and in each of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations. In contrast, the private practitioner represents the client's personal or private interest. . . . [W]e do not suggest, however, that the public is the client as the client concept is usually understood. It is to say that the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part.

Federal Bar Association Ethics Committee, The Government Client and Confidentiality: Opinion 73-1, 32 FED. B.J. 71, 72 (1973). Indeed, before an attorney in the Justice Department can step into the shoes of private counsel to represent a federal employee sued in his or her individual capacity, the Attorney General must determine whether the representation would be in the interest of the United States. *See* 28 C.F.R. § 50.15(a). The obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the government. As Judge Weinstein put it, "[i]f there is wrongdoing in government, it must be exposed. . . . [The government lawyer's] duty to the people, the law, and his own conscience requires disclosure. . . ." Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 MAINE L. REV. 155, 160 (1966).

This view of the proper allegiance of the government lawyer is complemented by the public's interest in uncovering illegality among its elected and appointed officials. While the President's

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Similarly, the government lawyer in a civil action must "seek justice" and avoid unfair settlements or results. *Id.* EC 7-14.

constitutionally established role as superintendent of law enforcement provides one protection against wrongdoing by federal government officials, *see United States v. Valenzuela-Bernal*, 458 U.S. 858, 863 (1982), another protection of the public interest is through having transparent and accountable government.[5] As James Madison observed,

> [a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910). This court has accordingly recognized that "openness in government has always been thought crucial to ensuring that the people remain in control of their government." *In re Sealed Case (Espy)*, 121 F.3d at 749. Privileges work against these interests because their recognition "creates the risk that a broad array of materials in many areas of the executive branch will become 'sequester[ed]' from public view." *Id.* (quoting *Wolfe v. Department of Health & Human Servs.*, 815 F.2d 1527, 1533 (D.C. Cir. 1987)). Furthermore, "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir.), *cert. denied*, 117 S.Ct. 2482 (1997).

Examination of the practice of government attorneys further supports the conclusion that a government attorney, even one holding the title Deputy White House Counsel, may not assert an attorney-client privilege before a federal grand jury if communications with the client contain information pertinent to possible

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[5] Congress has clearly indicated, as a matter of policy, that federal employees should not withhold information relating to possible criminal misconduct by federal employees on any basis. We discuss at more length Congress's recognition of these concerns below in our discussion of 28 U.S.C. § 535(b).

criminal violations. The Office of the President has traditionally adhered to the precepts of 28 U.S.C. § 535(b), which provides that

> [a]ny information . . . received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General.

28 U.S.C. § 535(b) (1994). We need not decide whether section 535(b) alone requires White House Counsel to testify before a grand jury.[6] The statute does not clearly apply to the Office of the President. The Office is neither a "department," as that term is defined by the statute, *see* 5 U.S.C. § 101 (1994); 28 U.S.C. § 451 (1994); *Haddon v. Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995) (per curiam), nor an "agency," *see Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (FOIA case); *see also Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1295 (D.C. Cir. 1993) (per curiam); *National Sec. Archive v. Archivist of the United States*, 909 F.2d 541, 545 (D.C. Cir. 1990) (per curiam). However, at the very least "[section] 535(b) evinces a strong congressional policy that executive branch employees must report information" relating to violations of Title 18, the federal criminal code. *In re Sealed Case (Secret Service)*, 1998 WL 370584, at *7. As the House Committee Report accompanying section 535 explains, "[t]he purpose" of the provision is to "require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning any alleged irregularities on the part of officers and employees of the Government." H.R. REP. NO. 83-2622, at 1 (1954). Section 535(b) suggests that all government employees,

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[6] 28 U.S.C. § 535(a) authorizes the Attorney General to "investigate any violation of title 18 [the federal criminal code] involving Government officers and employees." The Independent Counsel fills the shoes of the Attorney General in this regard because Congress has given the Independent Counsel "with respect to all matters in [his] prosecutorial jurisdiction . . . full power and independent authority to exercise all investigative and prosecutorial functions and powers of . . . the Attorney General." 28 U.S.C. § 594(a); *see In re Sealed Case (Secret Service)*, 1998 WL 370584, at *7.

including lawyers, are duty-bound not to withhold evidence of federal crimes.

Furthermore, government officials holding top legal positions have concluded, in light of section 535(b), that White House lawyers cannot keep evidence of crimes committed by government officials to themselves. In a speech delivered after the *Kissinger* FOIA case was handed down, Lloyd Cutler, who served as White House Counsel in the Carter and Clinton Administrations, discussed the "rule of making it your duty, if you're a Government official as we as lawyers are, a statutory duty to report to the Attorney General any evidence you run into of a possible violation of a criminal statute." Lloyd N. Cutler, *The Role of the Counsel to the President of the United States*, 35 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK No. 8, at 470, 472 (1980). Accordingly, "[w]hen you hear of a charge and you talk to someone in the White House . . . about some allegation of misconduct, almost the first thing you have to say is, 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'" *Id.* Similarly, during the Nixon administration, Solicitor General Robert H. Bork told an administration official who invited him to join the President's legal defense team: "A government attorney is sworn to uphold the Constitution. If I come across evidence that is bad for the President, I'll have to turn it over. I won't be able to sit on it like a private defense attorney." *A Conversation with Robert Bork*, D.C. BAR REP., Dec. 1997–Jan.1998, at 9.

The Clinton Administration itself endorsed this view as recently as a year ago. In the proceedings leading to the Supreme Court's denial of certiorari with regard to the Eighth Circuit's decision in *In re Grand Jury Subpoena Duces Tecum*, the Office of the President assured the Supreme Court that it "embraces the principles embodied in Section 535(b)" and acknowledged that "the Office of the President has a duty, recognized in official policy and practice, to turn over evidence of the crime." Reply Brief for Office of the President at 7, *Office of the President v. Office of Independent Counsel*, 117 S.Ct. 2482 (1997) (No. 96-1783). The Office of the President further represented that "on various occasions" it had "referred information to the Attorney General reflecting the possible commission of a criminal offense—including

information otherwise protected by attorney-client privilege." *Id.* At oral argument, counsel for the Office of the President reiterated this position. In addition, the White House report on possible misdeeds relating to the White House Travel Office stated that "[i]f there is a reasonable suspicion of a crime . . . about which White House personnel may have knowledge, the initial communication of this information should be made to the Attorney General, the Deputy Attorney General, or the Associate Attorney General." WHITE HOUSE TRAVEL OFFICE MANAGEMENT REVIEW 23 (1993).

We are not aware of any previous deviation from this understanding of the role of government counsel. We know that Nixon White House Counsel Fred Buzhardt testified before the Watergate grand jury without invoking attorney-client privilege, although not much may be made of this.[7] *See* Anthony Ripley, *Milk Producers' Group Fined $5,000 for Nixon Gifts*, N.Y. TIMES, May 7, 1974, at 38. On the other hand, the Office of the President points out that C. Boyden Gray, White House Counsel during the Bush Administration, and his deputy, John Schmitz, refused to be interviewed by the Independent Counsel investigating the Iran-Contra affair and only produced documents subject to an agreement that "any privilege against disclosure . . . including the attorney-client privilege" was not waived. 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 478–79 & n.52 (1993). However, the Independent Counsel in that investigation had not subpoenaed Gray or Schmitz to testify before a grand jury, and there is no indication that the information sought from them constituted evidence of any criminal offense. Independent Counsel Walsh apparently sought to question these individuals merely to complete his final report. *See id.* In any event, even outside the grand jury context, the general practice of government counsel has been to cooperate with the investigations of independent counsels. For example, Peter Wallison, White House Counsel under President Reagan, produced his diary for the Iran-Contra investigation and cooperated in other ways. *See id.* at 44, 470 n.137,

[7] President Nixon waived executive privilege and attorney-client privilege before the grand jury. *See* SPECIAL PROSECUTION FORCE, WATERGATE REPORT 88 (1975) [hereinafter WATERGATE REPORT].

517, 520. Other government attorneys both produced documents and agreed to be interviewed for that investigation. *See id.* at 346–48, 366–68, 536 & nn.116–17, 537.

The Office of the President asserts two principal contributions to the public good that would come from a government attorney's withholding evidence from a grand jury on the basis of an attorney-client privilege. First, it maintains that the values of candor and frank communications that the privilege embodies in every context would apply to Lindsey's communications with the President and others in the White House. Government officials, the Office of the President claims, need accurate advice from government attorneys as much as private individuals do, but they will be inclined to discuss their legal problems honestly with their attorneys only if they know that their communications will be confidential.

We may assume that if the government attorney-client privilege does not apply in certain contexts this may chill some communications between government officials and government lawyers. Even so, government officials will still enjoy the benefit of fully confidential communications with their attorneys unless the communications reveal information relating to possible criminal wrongdoing. And although the privacy of these communications may not be absolute before the grand jury, the Supreme Court has not been troubled by the potential chill on executive communications due to the qualified nature of executive privilege.[8] *Compare Nixon*, 418 U.S. at 712–13 (discounting the chilling effects of the qualification of the presidential communications privilege on the candor of conversations), *with Swidler & Berlin*, 1998 WL 333019, at *6 (stating, in the personal attorney-client privilege context, that an uncertain privilege is often no better than no privilege at all). Because both the Deputy White House Counsel and the Independent Counsel occupy positions within the federal government, their situation is somewhat comparable to that of corporate officers who seek to keep their communications with company attorneys confidential from each other and from the shareholders. Under the widely followed doctrine announced in *Garner*

[8] We do not address privilege exceptions relating to military secrets or other exempted communications.

v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), corporate officers are not always entitled to assert such privileges against interests within the corporation, and accordingly must consult with company attorneys aware that their communications may not be kept confidential from shareholders in litigation. *See id.* at 1101. Any chill on candid communications with government counsel flowing from our decision not to extend an absolute attorney-client privilege to the grand jury context is both comparable and similarly acceptable.

Moreover, nothing prevents government officials who seek completely confidential communications with attorneys from consulting personal counsel. The President has retained several private lawyers, and he is entitled to engage in the completely confidential communications with those lawyers befitting an attorney and a client in a private relationship. [[ ]]

The Office of the President contends that White House Counsel's role in preparing for any future impeachment proceedings alters the policy analysis.[9] The Ethics in Government Act requires the Independent Counsel to "advise the House of Representatives of any substantial and credible information . . . that may constitute grounds for an impeachment." 28 U.S.C. § 595(c) (1994). In November 1997, a Congressman introduced a resolution in the House of Representatives calling for an inquiry into possible grounds for impeachment of the President. *See* H.R. Res. 304, 105th Cong. (1997). Thus, to the extent that impeachment proceedings may be on the horizon, the Office of the President contends that White House Counsel must be given maximum protection against grand jury inquiries regarding their efforts to protect the Office of the President, and the President in his personal capacity, against impeachment. Additionally, the Office of the President notes that the Independent Counsel serves as a conduit to Congress for information concerning grounds for impeachment obtained by the grand

[9] The district court did not rule upon this argument, and hence we lack the benefit of that court's thinking in addition to a complete record on the nature, scope, and content of communications between the President and Deputy White House Counsel with regard to the impeachment issue. *See Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 (D.C. Cir. 1996) (per curiam).

jury, and, consequently, an exception to the attorney-client privilege before the grand jury will effectively abrogate any absolute privilege those communications might otherwise enjoy in future congressional investigations and impeachment hearings.

Although the Independent Counsel and the Office of the President agree that White House Counsel can represent the President in the impeachment process, the precise contours of Counsel's role are far from settled.[10] In any event, no matter what the role should be, impeachment is fundamentally a *political* exercise. *See* THE FEDERALIST No. 65 (Alexander Hamilton); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 764, at 559 (5th ed. 1905). Impeachment proceedings in the House of Representatives cannot be analogized to traditional legal processes and even the procedures used by the Senate in "trying" an impeachment may not be like those in a judicial trial. *See (Walter) Nixon v. United States*, 506 U.S. 224, 228–31 (1993); STORY, COMMENTARIES ON THE CONSTITUTION § 765, at 559–60. How the policy and practice supporting the common law attorney-client privilege would apply in such a political context thus is uncertain. In preparing for the eventuality of impeachment proceedings, a White House Counsel in effect serves the President as a political advisor, albeit one with legal expertise: to wit, Lindsey occupies a dual position as an As-

[10] While a prior Comptroller General has thought that White House Counsel could properly be paid out of federal funds for representing the President in matters leading up to an impeachment, *see* Letter from Elmer B. Staats, U.S. Comptroller General, to Rep. John F. Seiberling 7 (Oct. 25, 1974), history yields little guidance on the role that White House Counsel would properly play in impeachment proceedings. The only President impeached by the House and tried by the Senate, Andrew Johnson, retained private counsel, and his Attorney General resigned from office in order to assist in his defense. *See* WILLIAM H. REHNQUIST, GRAND INQUESTS 222 (1992). In contrast, after the House Judiciary Committee began an impeachment inquiry into the Watergate scandal, President Richard Nixon appointed James D. St. Clair as a special counsel to the President for Watergate-related matters. *See* WATERGATE REPORT 103. Although Nixon resigned before the House of Representatives voted on any articles of impeachment, St. Clair handled much of the President's defense until the President's resignation. *See id.* at 103–15. At the very least, nothing prevents a President faced with impeachment from retaining private counsel, and in turn this makes less clear what might be the division of labor between White House Counsel and private counsel.

sistant to the President and a Deputy White House Counsel. Thus, information gathered in preparation for impeachment proceedings and conversations regarding strategy are presumably covered by executive, not attorney-client, privilege. While the need for secrecy might arguably be greater under these circumstances, the district court's ruling on executive privilege is not before us. In addition, in responding to the grand jury investigation and gathering information in preparation for future developments in accordance with his official duties, White House Counsel may need to interact with the President's private attorneys, and to that extent other privileges may be implicated. [[ ]]

Nor is our conclusion altered by the Office of the President's concern over the possibility that Independent Counsel will convey otherwise privileged grand jury testimony of White House Counsel to Congress.[11] *Cf.* FED. R. CRIM. P. 6(e). First, no one can say with certainty the extent to which a privilege would generally protect a White House Counsel from testifying at a congressional hearing. The issue is not presently before the court.[12] *See Nixon*, 418 U.S. at 712 n.19; *In re Sealed Case (Espy)*, 121 F.3d at 739 nn.9–10, 753. Second, the particular procedures and evidentiary rules to be employed by the House and Senate in any future impeachment proceedings remain entirely speculative. Finally, whether Congress can abrogate otherwise recognized privileges in the course of impeachment proceedings may well constitute a nonjusticiable political question. *See (Walter) Nixon*, 506 U.S. at 236.

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[11] Contrary to the Office of the President's suggestion, this is not a novel concern stemming from the Ethics in Government Act. During initial discussions with the Watergate Special Prosecutor, "[James] St. Clair was primarily concerned that evidence produced for the grand jury not subsequently be provided by [the Special Prosecutor] to the House Judiciary Committee for use in its impeachment inquiry." WATERGATE REPORT 104–05. The Special Prosecutor eventually asked the grand jury to transmit an "evidentiary report" to the House Committee considering President Nixon's impeachment. *Id.* at 143.

[12] The Office of the President cites no authority for the proposition that communications between White House Counsel and the President would be absolutely privileged in congressional proceedings, but rather merely suggests that they "should" be.

The Supreme Court's recognition in *United States v. Nixon* of a qualified privilege for executive communications severely undercuts the argument of the Office of the President regarding the scope of the government attorney-client privilege. A President often has private conversations with his Vice President or his Cabinet Secretaries or other members of the Administration who are not lawyers or who are lawyers, but are not providing legal services. The advice these officials give the President is of vital importance to the security and prosperity of the nation, and to the President's discharge of his constitutional duties. Yet upon a proper showing, such conversations must be revealed in federal criminal proceedings. *See Nixon*, 418 U.S. at 713; *In re Sealed Case (Espy)*, 121 F.3d at 745. Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.

The district court held that a government attorney-client privilege existed and was applicable to grand jury proceedings, but could be overcome, as could an applicable executive privilege, upon a showing of need and unavailability elsewhere by the Independent Counsel. While we conclude that an attorney-client privilege may not be asserted by Lindsey to avoid responding to the grand jury if he possesses information relating to possible criminal violations, he continues to be covered by the executive privilege to the same extent as the President's other advisers. Our analysis, in addition to having the advantages mentioned above, avoids the application of balancing tests to the attorney-client privilege—a practice recently criticized by the Supreme Court. *See Swidler & Berlin*, 1998 WL 333019, at *6.

In sum, it would be contrary to tradition, common understanding, and our governmental system for the attorney-client

privilege to attach to White House Counsel in the same manner as private counsel. When government attorneys learn, through communications with their clients, of information related to criminal misconduct, they may not rely on the government attorney-client privilege to shield such information from disclosure to a grand jury.

III.

[[ ]].

IV.

Accordingly, for the reasons stated in this opinion, we affirm [[ ]].

In accordance with the Supreme Court's expectation that "the Court of Appeals will proceed expeditiously to decide this case," *Clinton*, 118 S.Ct. at 2079, any petition for rehearing or suggestion for rehearing *in banc* shall be filed within seven days after the date of this decision.

It is so ordered.

TATEL, *Circuit Judge, dissenting from Part II and concurring in part and dissenting in part from Part III.* The attorney-client privilege protects confidential communication between clients and their lawyers, whether those lawyers work for the private sector or for government. Although I have no doubt that government lawyers working in executive departments and agencies enjoy a reduced privilege in the face of grand jury subpoenas, I remain unconvinced that either "reason" or "experience" (the tools of Rule 501) justifies this court's abrogation of the attorney-client privilege for lawyers serving the Presidency. This court's far-reaching ruling, moreover, may have been unnecessary to give this grand jury access to Bruce Lindsey's communications with the President, for on this record it is not clear whether those communications involved official legal advice that would be protected by the attorney-client privilege. Before limiting the attorney-client privilege not just for this President, but for all Presidents to come, the court should have first remanded this case to the district court to recall

Lindsey to the grand jury to determine the precise nature of his communications with the President.

I

My colleagues and I have no disagreement concerning personal legal advice Lindsey may have given the President. We agree, and the White House concedes, that the official attorney-client privilege does not protect such communications, for as a White House employee Lindsey had no authority to provide such advice. Nor do we disagree about political advice given to the President by advisers who happen to be lawyers. Such advice is protected, if at all, by the executive privilege alone. Our disagreement centers solely on whether a grand jury can pierce the attorney-client privilege with respect to official legal advice that the Office of White House Counsel gives a sitting President.

One of the oldest privileges at common law and "'rooted in the imperative need for confidence and trust,'" *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)), the attorney-client privilege "encourage[s] 'full and frank communication between attorneys and their clients, and thereby promote[s] broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin v. United States*, No. 97-1192, 1998 WL 333019, at *3 (U.S. June 25, 1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The privilege protects client confidences even in the face of grand jury subpoenas. *See id.* at *2, *7.

Government attorneys enjoy the attorney-client privilege in order to provide reliable legal advice to their governmental clients. "Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization . . . and of an individual officer . . . of a governmental organization." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ("RESTATEMENT") § 124 (Proposed Final Draft No. 1, 1996); *see also* PROPOSED FED. R. EVID. 503(a)(1), *reprinted in* 56 F.R.D. 183, 235 (1972). We have explained that where "the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, [it] needs the same assurance of confidentiality so it will not be deterred from full and frank com-

munications with its counselors." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980); *see also Tax Analysts v. IRS*, 117 F.3d 607, 620 (D.C. Cir. 1997) ("Communications revealing . . . client confidences [between IRS field personnel and IRS counsel regarding audit activity] . . . are clearly covered by the attorney-client privilege . . . .")

This court now holds that for all government attorneys, including those advising a President, the attorney-client privilege dissolves in the face of a grand jury subpoena. According to the court, its new rule "avoids the application of balancing tests to the attorney-client privilege—a practice recently criticized by the Supreme Court." Maj. Op. at 26. But whether a court abrogates the privilege by applying the balancing test rejected in *Swidler*, or by the rule the court adopts today, the chilling effect is precisely the same. Clients, in this case Presidents of the United States, will avoid confiding in their lawyers because they can never know whether the information they share, no matter how innocent, might some day become "pertinent to possible criminal violations," *id.* at 18. Rarely will White House counsel possess cold, hard facts about presidential wrongdoing that would create a strong public interest in disclosure, yet the very possibility that the confidence will be breached will chill communications. *See Swidler*, 1998 WL 333019, at *5–6. As a result, Presidents may well shift their trust on all but the most routine legal matters from White House counsel, who undertake to serve the Presidency, to private counsel who represent its occupant.

Unlike *Jaffee*, 518 U.S. at 10–11 (recognizing a federal psychotherapy privilege), and *In re Sealed Case*, No. 98-3069, 1998 WL 370584, at *4 (D.C. Cir. July 7, 1998) (declining to recognize a protective function privilege for Secret Service agents), this case involves not the creation of a new privilege, but as in *Swidler*, the carving out of an exception to an already well-established privilege. *See Swidler*, 1998 WL 333019, at *6. Denying that they are creating an exception, my colleagues say that they are "defining the particular contours of the government attorney-client privilege," Maj. Op. at 14, but no court has suggested that the attorney-client privilege must be extended client by client to each new governmental entity, proceeding by proceeding. Rather, "[u]nless applicable law otherwise provides," RESTATEMENT § 124, the privilege applies to all attorneys and all clients, regardless of their identities or the nature of the proceeding, *see Swidler*, 1998 WL 333019, at *6 (finding no case authority for civil-criminal distinction). The question before us, then, is whether either "reason" or "experience" (FED. R. EVID. 501), calls for exempting the Presidency from the traditional attorney-client relationship that all clients enjoy with their lawyers. *See, e.g.*, *Trammel*, 445 U.S. at 48, 52 (curtailing spousal privilege based on majority trend in state law, the disappearance of "ancient" notions of the subordinate status of women, and the unpersuasiveness of arguments regarding privilege's effect on marital stability).

As one of its reasons for abrogating the presidential attorney-client privilege, the court says that legal advice is no different from the advice a President receives from other advisers, advice protected only by executive privilege. Maj. Op. at 25–26. I think the court seriously underestimates the independent role and value of the attorney-client privilege. Unlike the executive privilege—a broad, constitutionally derived privilege that protects frank debate between President and advisers, *see United States v. Nixon*, 418 U.S. 683, 708 (1974); *In re Sealed Case*, 121 F.3d 729, 742–46 (D.C. Cir. 1997)—the narrower attorney-client privilege flows not from the Constitution, but from the common law, *see Swidler*, 1998 WL 333019, at *7. The attorney-client privilege does not protect general policy or political advice—even when given by lawyers—but only communications with lawyers "for the purpose of obtaining legal assistance." RESTATEMENT § 122. Necessitated by the nature of the lawyer's function, the attorney-client privilege enables the lawyer as an officer of the court properly to advise the client, including facilitating compliance with the law. *See Upjohn*, 449 U.S. at 389. In other words, the unique protection the law affords a President's communications with White House counsel rests not, as my colleagues put it, on some "conceit" that "lawyers are more important to the operations of government than all other officials," Maj. Op. at 26, but rather on the special nature of legal advice, and its special need for confidentiality, as recognized by centuries of common law. It therefore makes sense that the Presi-

dency possesses both the attorney-client and executive privileges, and that courts treat them differently.

The court also cites 28 U.S.C. § 535(b). Although that statute generally supports qualifying—though not abrogating—the attorney-client privilege for government attorneys working in executive departments and agencies, the court acknowledges, as the Attorney General has told us in her *amicus* brief, that section 535(b) does not apply to the Office of the President. The court cites several statements, including former White House Counsel Lloyd Cutler's speech to the New York Bar, the White House Travel Office Management Review, and the Administration's *certiorari* petition in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S.Ct. 2482 (1997), indicating that White House lawyers comply with the spirit of section 535(b). Maj. Op. at 19–20. Nothing in those statements suggests, however, that their authors were referring to conversations between White House counsel and the President of the United States, *i.e.*, that one presidential subordinate (White House counsel) would report a confidential conversation with a President to another presidential subordinate (the Attorney General). The court points to no other statutory basis for denying the President the benefit of the official privilege. Although the Independent Counsel statute ensures independent, aggressive prosecution of wrongdoing, nothing in that statute disables a President from defending himself or otherwise indicates that Congress intended to deprive the Presidency of its official privileges.

The court refers to actions of a few previous White House counsel: Fred Buzhardt testified voluntarily before the Watergate grand jury; Peter Wallison turned over his diaries to the Iran-Contra investigation; and C. Boyden Gray and his deputy refused to be interviewed by that same Iran-Contra Independent Counsel. *See* Maj. Op. at 20–21. In my view, these limited and contradictory examples reveal nothing about the standard we should apply where, as here, a President of the United States actually invokes the attorney-client privilege in the face of a grand jury subpoena.

Acknowledging the facial inapplicability of section 535(b) to the Office of the President, the court relies on the government lawyer's oath of office for the proposition that White House counsel

cannot have a traditional attorney-client relationship with the President. But all lawyers, whether they work within the government or the private sector, take an oath to uphold the Constitution of the United States. In order to practice before this court, for example, attorneys must promise to "demean [themselves] . . . according to law . . . [and] support the Constitution of the United States." Application for Admission to Practice (U.S. Court of Appeals for the D.C. Circuit). No one would suggest that this oath abrogates a client's privilege in the face of a grand jury subpoena.

This court's opinion, moreover, nowhere accounts for the unique nature of the Presidency, its unique need for confidential legal advice, or the possible consequences of abrogating the attorney-client privilege for a President's ability to obtain such advice. Elected, head of the Executive Branch, Commander-in-Chief, head of State, and removable only by impeachment, the President is not just "a part of the federal government, consisting of government employees doing government business." Maj. Op. at 2. As Justice Robert H. Jackson observed in the steel seizure case, the Presidency concentrates executive authority "in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring). Echoing Justice Jackson three decades later, the Supreme Court emphasized in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), that the President "occupies a unique position in the constitutional scheme," *id.* at 749, that we depend on the President for the "most sensitive and far-reaching decisions entrusted to any official under our constitutional system," *id.* at 752, and that the President's "unique status under the Constitution" distinguishes him from other executive branch officials, *id.* at 750. The Attorney General, focusing on the President's "singular responsibilities," describes the Presidency's critical need for legal advice as follows:

> The Constitution vests the President with unique, and uniquely consequential, powers and responsibilities. The Nation's "executive Power" is vested in him alone. U.S. Const. Art. II, § 1. In addition to his sig-

> nificant and diverse domestic and foreign affairs responsibilities, he is specifically required to adhere to and follow the law, both in his oath of office (Art. II, § 1, Cl. 8) and in the requirement that "he shall take Care that the Laws be faithfully executed." Art. II, § 3. To fulfill his manifold duties and functions, the President must have access to legal advice that is frank, fully informed, and confidential. Because of the magnitude of the Nation's interest in facilitating the President's conduct of his office in accordance with law, the President's pressing need for effective legal advice knows no parallel in government.

Amicus Br. at 24. By lumping the President together with tax collectors, passport application processors, and all other executive branch employees—even cabinet officers—the court bypasses the reasoned "case-by-case" analysis demanded by Rule 501, *Jaffee*, 518 U.S. at 8 (quoting S. REP. NO. 93-1277, at 13 (1974)).

A President's need for confidential legal advice may "know[ ] no parallel in government" for another reason. Because the Presidency is tied so tightly to the persona of its occupant, and because of what *Fitzgerald* referred to as the Presidency's increased "vulnerability," stemming from "the visibility of [the] office and the effect of [the President's] actions on countless people," *Fitzgerald*, 457 U.S. at 753, official matters—proper subjects for White House counsel consultation—often have personal implications for a President. Since for any President the line between official and personal can be both elusive and difficult to discern, I think Presidents need their official attorney-client privilege to permit frank discussion not only of innocuous, routine issues, but also sensitive, embarrassing, or even potentially criminal topics.

The need for the official presidential attorney-client privilege seems particularly strong after Watergate which, while ushering in a new era of accountability and openness in the highest echelons of government, also increased the Presidency's vulnerability. Aggressive press and congressional scrutiny, the personalization of politics, and the enactment of the Independent Counsel statute, Pub. L. No. 95-521, Tit. VI, 92 Stat. 1824, 1867 (1978) (codified as amended at 28 U.S.C. §§ 591–599 (1994))—which triggers ap-

pointment of an Independent Counsel based on no more than the existence of "reasonable grounds to believe that further investigation is warranted," 28 U.S.C. § 592(c)(1)(A)—have combined to make the Supreme Court's fear that Presidents have become easy "target[s]," *Fitzgerald*, 457 U.S. at 753, truer than ever. No President can navigate the treacherous waters of post-Watergate government, make controversial official legal decisions, decide whether to invoke official privileges, or even know when he might need private counsel, without confidential legal advice. Because of the Presidency's enormous responsibilities, moreover, the nation has compelling reasons to ensure that Presidents are well defended against false or frivolous accusations that could interfere with their duties. The nation has equally compelling reasons for ensuring that Presidents are well advised on whether charges are serious enough to warrant private counsel. I doubt that White House counsel can perform any of these functions without the candor made possible by the attorney-client privilege. As I said at the outset, weakening the privilege may well cause Presidents to shift their trust from White House lawyers who have undertaken to serve the Presidency, to private lawyers who have not.

Preserving the official presidential attorney-client privilege would not place the President above the law, as the Independent Counsel implies. To begin with, by enabling clients—including Presidents—to be candid with their lawyers and lawyers to advise clients confidentially, the attorney-client privilege promotes compliance with the law. *See Upjohn*, 449 U.S. at 389. Independent Counsels, moreover, have powerful weapons to combat abuses of the attorney-client privilege. If evidence suggested that a President used White House counsel to further a crime, the crime-fraud exception would abrogate the privilege. *See United States v. Zolin*, 491 U.S. 554, 562–63 (1989). If an Independent Counsel had evidence that White House counsel's status as an attorney was used to protect non-legal materials from disclosure, those materials would not be protected. *See State v. Philip Morris Inc.*, No. C1-94-8565, 1998 WL 257214, at *7 (Minn. Dist. Ct. Mar. 7, 1998) (releasing documents as penalty for bad faith claim of privilege). "The privilege takes flight," Justice Benjamin Cardozo said, "if the [attorney-client] relation is abused." *Clark v. United States*, 289 U.S. 1, 15

(1933). Or if an Independent Counsel presented evidence that a White House counsel committed a crime, a grand jury could indict that lawyer. *See* George Lardner, Jr., *Dean Guilty in Cover-Up: Nixon Ex-Aide Pleads to Count of Conspiracy*, WASH. POST, Oct. 20, 1973, at A1. This Independent Counsel has never alleged that any of these abuses occurred.

To be sure, a properly exercised attorney-client privilege may deny a grand jury access to information, *see Swidler*, 1998 WL 333019, at *6 (justifying the burden placed on the truth-seeking function by the privilege), but Presidents remain accountable in other ways, *see Fitzgerald*, 457 U.S. at 757 (checks on Presidential action include impeachment, press scrutiny, congressional oversight, need to maintain prestige, and concern for historical stature). An Independent Counsel, moreover, can always report to Congress that a President has denied critical information to a grand jury. *See* 28 U.S.C. § 595(a)(2), (c). If the President continues to exercise his attorney-client privilege in the face of a congressional subpoena, and if Congress believes that the President has committed "high Crimes and Misdemeanors," U.S. CONST. art. II, § 4, Congress can always consider impeachment. *See* H. REP. NO. 93-1305, at 4, 187–213 (1974) (recommending impeachment of President Nixon based on his refusal to turn over information in response to congressional subpoenas).

II

During Lindsey's several grand jury appearances he invoked both executive and attorney-client privileges, often with respect to the same questions. Now that the White House has dropped the executive privilege issue, much of that information may be available to the Independent Counsel and we have no way of knowing which questions, if any, Lindsey would continue to decline to answer. Even more fundamental, Lindsey's affidavit, [[ ]] and the affidavit of White House Counsel Charles F.C. Ruff suggest that the communications between Lindsey and the President regarding the Monica Lewinsky and Paula Jones matters may have involved political and policy discussions, not legal advice. To be sure, the affidavits [[ ]] refer to advice about legal topics, such as invoking privileges and preparing for impeachment. But nowhere do they

demonstrate that Lindsey rendered that advice in his capacity as a lawyer, *i.e.*, that "the lawyer's professional skill and training would have value in the matter." RESTATEMENT § 122 cmt. b. A conversation is not privileged merely because the President asked Lindsey a question about a nominally legal matter or in his capacity as White House Counsel staff. For example, if Lindsey advised the President about the political implications of invoking executive privilege, that communication would not be privileged; if he discussed the availability of the privilege as a legal matter, the conversation would be protected.

Distinguishing between Lindsey's legal and non-legal advice becomes even more difficult because not only does Lindsey wear two hats, one legal (Deputy White House Counsel) and one non-legal (Special Assistant to the President), but the Office of White House Counsel has historically performed many non-legal functions, such as giving policy advice, writing speeches, and performing various political tasks. *See* STEPHEN HESS, ORGANIZING THE PRESIDENCY 36, 43, 84 (1988); Lloyd N. Cutler, *The Role of the Counsel to the President of the United States*, 35 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 470, 472–76 (1980); Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, LAW & CONTEMP. PROBS., Autumn 1993, at 63, 65–76. When an advisor serves dual roles, the party invoking the privilege bears a particularly heavy burden of demonstrating that the services provided were in fact legal. *See, e.g.*, *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995) (where agency "delegated policymaking authority to its outside counsel to such an extent that counsel ceased to function as lawyers and began to function as regulators," it could not invoke attorney-client privilege); RESTATEMENT § 122 cmt. c (whether privilege applies to lawyer acting in dual roles depends upon circumstances); *cf. In re Sealed Case*, 121 F.3d at 752 (with respect to "'dual hat' presidential advisors, the government bears the burden of proving that the communications" are covered by the executive privilege).

Accordingly, before abrogating the official attorney-client privilege for all future Presidents, this court should have remanded to the district court to allow the Independent Counsel to recall

Lindsey to the grand jury to determine whether, with respect to each question that he declines to answer, he can demonstrate the elements of the attorney-client privilege, namely that each communication was made between privileged persons in confidence "for the purpose of obtaining or providing legal assistance for the client," RESTATEMENT § 118. *See United States v. Kovel*, 296 F.2d 918, 923 (2nd Cir.1961) (remanding to permit accountant witness to offer factual support for assertion that communications were made in pursuit of legal advice). If Lindsey failed to meet this burden, that would end the matter, leaving for another day the difficult question of presidential attorney-client privilege, with its consequences for the functioning of the Presidency, as well as its potential implications for possible impeachment proceedings (implications we have hardly begun to consider). *See* Maj. Op. at 23–25; Office of the President Br. at 26–29; Office of the Independent Counsel Br. at 35; *cf. Amicus* Br. at 34–37. On the other hand, if Lindsey demonstrated that his communications involved official legal advice, the district court could use the remand to enrich the record by, for example, inviting former White House counsel to describe the nature of the relationship between Presidents and White House counsel generally and the role of the attorney-client privilege in particular. This would create an infinitely more useful record for us, or eventually the Supreme Court, to determine whether reason or experience justifies any change in the official presidential attorney-client privilege, and if so, whether the privilege can be modified without threatening a President's ability to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. *See Swidler*, 1998 WL 333019, at *6 n.4 (noting lack of empirical evidence in support of limiting the privilege); *Jaffee*, 518 U.S. at 16 & n.16 (relying on *amicus* briefs citing psychology and social work studies); *Trammel*, 445 U.S. at 48, 52 (relying on historical developments regarding the role of women in marriage).

I do not consider the Supreme Court's expectation that we proceed expeditiously to be inconsistent with our obligation to engage in fully reasoned and informed decision-making. The importance to the Presidency of effective legal advice requires no less. Moreover, according to the Independent Counsel, the grand jury is exploring whether obstruction of justice, perjury, witness intimi-

dation, and other crimes were committed in January 1998. *See* 18 U.S.C. § 3282 (establishing five-year statute of limitations for non-capital federal crimes). We thus have time to determine whether we need to resolve this important question and, if so, to ensure that we do so on the basis of a fuller, more useful record. If the Independent Counsel needs to report to Congress more expeditiously, he is free to do so.

III

[[ ]]

In re Grand Jury Proceedings.

Nos. 98-095 (NHJ), 98-096(NHJ), 98-097(NHJ).

United States District Court,
District of Columbia.

May 4, 1998.

ORDER

Upon consideration of the motions of the Independent Counsel to compel, supporting and opposing memoranda, and oral argument on the motions, and for the reasons given in the accompanying Memorandum Opinion, it is this 1st day of May 1998,

ORDERED that the motion of the Independent Counsel to compel Bruce Lindsey to testify in Miscellaneous Action No. 98-95 be, and hereby is, granted; it is further

ORDERED that the motion of the Independent Counsel to compel Sidney Blumenthal to testify in Miscellaneous Action No. 98-96 be, and hereby is, granted; and it is further

ORDERED that the motion of the Independent Counsel to compel [REDACTED] to testify in Miscellaneous Action No. 98-97 be, and hereby is, denied as moot.

/s/
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

In re Grand Jury Proceedings.

Nos. 98-095 (NHJ), 98-096(NHJ), 98-097(NHJ).

United States District Court,
District of Columbia.

May 4, 1998.

MEMORANDUM OPINION

Before this Court are the Independent Counsel's motions to compel three witnesses to comply with their grand jury subpoenas. Witnesses Bruce Lindsey and Sidney Blumenthal have refused to answer certain questions propounded to them before the grand jury on the basis of executive privilege and Lindsey has refused to answer certain questions based upon the [REDACTED], governmental attorney-client privilege, and governmental work product protection. The attorney for the White House represented to the Court at a hearing on this matter that there were no questions as to which the third witness, [REDACTED] would assert the executive privilege or the attorney-client privilege. The Court will therefore deny the Independent Counsel's motion to compel [REDACTED] testimony as moot.

With respect to the remaining witnesses, the Court will first address their mutual claim of executive privilege. [REDACTED] Lastly, the Court will consider Lindsey's claim of governmental attorney-client privilege and work product protection.

I. ANALYSIS

A. Executive Privilege

The OIC has moved to compel the testimony of Lindsey and Blumenthal, two of President Clinton's senior advisers. The President has asserted that the executive privilege, also known as the presidential communications privilege, protects conversations involving himself, Lindsey and Blumenthal, and top White House aides. The presidential communications privilege is a governmen-

tal privilege intended to promote candid communications between the President and his advisors concerning the exercise of his Article II duties. *United States v. Nixon*, 418 U.S. 683, 705, 708, 711 (1974); *In re Sealed Case*, 121 F.3d 729, 744 (D.C.Cir.1997) (the "Espy case"). This Circuit has recognized a "great public interest" in preserving "the confidentiality of conversations that take place in the President's performance of his official duties" because such confidentiality is necessary in order to protect "the effectiveness of the executive decision-making process." *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C.Cir.1973); *In re Sealed Case*, 121 F.3d at 742. Courts have recognized that the President "occupies a unique position in the constitutional scheme," *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) and that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." *Nixon*, 418 U.S. at 708 (quoting *United States v. Burr*, 25 F.Cas. 187, 192 (C.C.D.Va. 1807)).

1. The Presumption of Privilege

The White House argues that the communications of Lindsey and Blumenthal are presumptively privileged because President Clinton has invoked executive privilege. The OIC counters that the communications are not privileged because the executive privilege applies only to communications regarding official presidential matters and the federal grand jury investigation regarding Monica Lewinsky and the Paula Jones litigation are private matters. In light of the holdings of the United States Supreme Court and the Court of Appeals for the District of Columbia Circuit, this Court finds that it has a duty to treat the subpoenaed testimony of Lindsey and Blumenthal as presumptively privileged. *See Nixon*, 418 U.S. at 713; *In re Sealed Case*, 121 F.3d at 743.

Prompted by the Watergate investigation, the Supreme Court held that when the President of the United States asserts a claim of executive privilege, the district court has a "duty to . . . treat the subpoenaed material as *presumptively privileged*." *Nixon*, 418 U.S. at 713 (emphasis added). The D.C. Circuit recently reiterated this holding when it considered President Clinton's assertion of the executive privilege in the context of a federal grand jury investigation of Michael Espy, former Secretary of Agriculture. *In re Sealed*

Case, 121 F.3d at 743. The D.C. Circuit wrote: "The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged." *Id.* at 744. In the Espy case, the D.C. Circuit treated the executive communications at issue as presumptively privileged just as it had done in earlier cases involving President Nixon's assertions of executive privilege. *Id.* at 743; *see Sirica*, 487 F.2d at 717; *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 730 (1974) ("Presidential conversations are 'presumptively privileged,' even from the limited intrusion represented by *in camera* examination of the conversations by a Court."). The presumptive privilege for executive communications "embodies a strong presumption, and not merely a lip-service reference." *Dellums v. Powell*, 561 F.2d 242, 246 (D.C. Cir.), *cert. denied*, 434 U.S. 880 (1977).

No court has ever declined to treat executive communications as presumptively privileged on the grounds that the matters discussed involved private conduct. In fact, in the Nixon cases, the D.C. Circuit and the Supreme Court treated President Nixon's executive communications with his aides as presumptively privileged even though they involved the President's alleged criminal involvement in a break-in at the Democratic National Committee headquarters and its subsequent cover-up. *See Nixon*, 418 U.S. at 708; *Sirica*, 487 F.2d at 717; *Senate Select*, 498 F.2d at 730. In *Senate Select*, the subpoena explicitly directed President Nixon to give Congress taped conversations between himself and John Dean that "discuss[ed] alleged criminal acts occurring in connection with the Presidential election of 1972." 498 F.2d at 727. The D.C. Circuit not only presumed that the conversations were privileged, but also stated that the showing of need required to overcome the presumption "turned, not on the nature of the presidential conduct that the subpoenaed material might reveal, but instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment." *Id.* at 730. In other words, the nature of the presidential conduct at issue, whether it was official

or private, appeared not to affect the presumption of privilege or the need stage of the D.C. Circuit's executive privilege analysis.

Purely private conversations that did not touch on any aspect of the President's official duties or relate in some manner to presidential decision-making would not properly fall within the executive privilege.[1] However, the President does need to address personal matters in the context of his official decisions. The position that nothing the President or his advisors could say to each other regarding the grand jury investigation or the *Jones* litigation would relate to the President's official duties is oversimplified. Indeed, the Independent Counsel has conceded that certain executive communications, such as those discussing how the President should respond to the Lewinsky matter during Tony Blair's visit, are protected by the executive privilege. 3/20/98 Tr. at 61–62.

At this stage, the Court has no evidence that Lindsey and Blumenthal's conversations discussing the Lewinsky and Jones matters were not related in some way to official decision-making. To the contrary, the Court has [REDACTED] sworn affidavits asserting that the conversations at issue involved official matters such as possible impeachment proceedings, domestic and foreign policy matters, and assertions of official privileges.[2] The Office of the President submitted the affidavits "to establish as a factual matter that the communications in the White House over which executive privilege was being asserted related to official matters and official conduct." 3/20/98 Tr. at 43. The grand jury transcripts provided to the Court do not indicate that the witnesses refused to answer questions regarding conversations that did not relate to the President's official duties. The Court will not speculate that conversations among the President and his advisors fell outside of the President's Article II responsibilities.

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[1] *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977) (noting that the privilege is "limited to communications 'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions' "); *In re Sealed Case*, 121 F.3d at 752 ("Of course, the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters.").

[2] Declaration of Charles F.C. Ruff at ¶¶ 19–28; [REDACTED].

The Court does not have documents or tapes to review *in camera* that could establish whether the content of the subpoenaed communications relates only to private matters, nor does it know how Lindsey and Blumenthal might answer the grand jury's questions. The Court is aware of only the unanswered questions themselves. Furthermore, unlike the Espy case, the subpoenas here call for testimony, not documents that the Court could review *in camera*. The Court's ability to assess whether the subpoenaed materials relate to official decisions is thus greatly hindered. This Circuit has stated:

> [A]ny court completely in the dark as to what Presidential files contain is duty bound to respect "the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article." For "a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual,' " and "(i)t is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice." .... [T]here is a presumption of privilege which can only be overcome by some demonstration of need.

United States v. Haldeman, 559 F.2d 31, 76 (D.C. Cir. 1976) (footnotes omitted), *cert. denied sub. nom Ehrlichman v. United States*, 431 U.S. 933 (1977).

Under *Nixon*, the Court has a duty to treat the subpoenaed testimony as presumptively privileged. 418 U.S. at 713. In light of this binding precedent, the factual similarities between the Nixon cases and the case at hand, and the evidence submitted with respect to the President's invocation of privilege, this Court finds that it must treat the communications of Lindsey and Blumenthal as presumptively privileged.

2. The Scope of the Privilege

Although the Court must presume that presidential communications are privileged, the scope of the privilege is limited to

"communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate." *In re Sealed Case*, 121 F.3d at 752. In other words, the President does not have to participate personally in the communication in order for it to be privileged.

Citing the presidential communications privilege, Lindsey refused to answer questions before the grand jury regarding a conversation he had with [REDACTED]. The White House did not mention [REDACTED] in its brief or at the hearings before this Court, much less argue that [REDACTED] is a presidential adviser. At any rate, the White House has not met its burden of showing that [REDACTED] communications with Lindsey "occurred in conjunction with the process of advising the President" *Id.* Accordingly, the Court finds that any conversations between Lindsey and [REDACTED] are not covered by the executive privilege.

Both Lindsey and Blumenthal refused to answer questions before the grand jury regarding conversations they had with the First Lady, citing executive privilege. [REDACTED] states: "The First Lady functions as a senior adviser to the President, and it was in that capacity that I had discussions with her about the Independent Counsel's investigation." [REDACTED] At the hearing on this matter, in response to a question from the Court, the attorney for the White House argued that First Ladies have traditionally held a position of senior adviser to the President and cited *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993). The OIC has not contested that Mrs. Clinton would be covered by the executive privilege.

In *Association of American Physicians & Surgeons*, the D.C. Circuit faced the question of whether Mrs. Clinton was an "officer or employee of the government" for purposes of the Federal Advisory Committee Act ("FACA"). *Id.* at 902. Mrs. Clinton chaired the President's Task Force on National Health Care Reform ("Task Force"), which was to advise the President and make recommendations to him. The issue before the D.C. Circuit was whether the

Task Force qualified for an exemption from FACA as an advisory group whose members were all officers and employees of the government. Rather than decide the constitutional question of whether the application of FACA would unconstitutionally interfere with the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art II. § 3, the court decided that Mrs. Clinton was an officer or employee of the government under FACA. *Id.* at 911. In the D.C. Circuit's discussion of the constitutional question, the court stated: "This Article II right to confidential communications attaches not only to direct communications with the President, but also to discussions between his senior advisers. . . . [I]f the President seeks advice from those closest to him, whether in or out of government, the President's spouse, typically, would be regarded as among those closest advisers." *Id.* at 909–10.

Mrs. Clinton is widely seen as an advisor to the President and "Congress itself has recognized that the President's spouse acts as the functional equivalent of an assistant to the President." *Id.* at 904 (citing 3 U.S.C. § 105(e)). The Court finds that conversations between the First Lady and Lindsey or Blumenthal fall under the executive privilege.

3. OIC's Showing of Need

The presumptive executive privilege is not absolute. *Sirica*, 487 F.2d at 716. The Court will not accept the President's "mere assertion of privilege as sufficient to overcome the need of the party subpoenaing the [testimony]." *Id.* at 713. The presumption of privilege may be rebutted by a sufficient showing of need by the Independent Counsel.[3] *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997).

In deciding what showing of need is sufficient to overcome an assertion of the executive privilege, the D.C. Circuit looked to the need analyses established in the cases involving President Nixon and the Watergate investigation. *Id.* at 753.[4] The court found that

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[3] *See Nixon*, 418 U.S. at 713; *In re Sealed Case*, 121 F.3d at 742; *Dellums*, 561 F.2d at 249; *Senate Select*, 498 F.2d at 730.

[4] The D.C. Circuit examined the need analyses established in *Nixon*, 418 U.S. at 713; *Sirica*, 487 F.2d at 716; and *Senate Select*, 498 F.2d at 731.

these cases "balanced the public interests served by protecting the President's confidentiality in a particular context with those furthered by requiring disclosure." *Id.* Working from the Supreme Court's rather vague requirement of a "demonstrated, specific need for evidence," *Nixon*, 418 U.S. at 713, the D.C. Circuit concluded that in order to overcome an assertion of executive privilege, the OIC must show "first, that each discrete group of the subpoenaed materials likely contains important evidence; and second that this evidence is not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d at 754. These elements must be shown "with specificity." *Id.* at 756. The information sought need not be "critical to an accurate judicial determination." *Id.* at 754.

The first requirement means that the evidence being sought must be "directly relevant to the issues that are expected to be central to the trial." *Id.* The D.C. Circuit noted that this requirement will not typically have much impact because Federal Rule of Criminal Procedure 17(c) already limits a subpoena to relevant information. With respect to the second requirement, the party seeking to overcome the privilege should first attempt to determine whether sufficient evidence could be obtained elsewhere. *Id.* at 755. The issuer of the subpoena "should be prepared to detail these efforts and explain why evidence covered by the presidential privilege is still needed." *Id.* The Court of Appeals has noted:

> there will be instances where such privileged evidence will be particularly useful, as when, unlike the situation here, an immediate White House advisor is being investigated for criminal behavior. In such situations, the subpoena proponent will be able easily to explain why there is no equivalent to evidence likely contained in the subpoenaed materials.

Id. The court also foresaw that "a grand jury will often be able to specify its need for withheld evidence in reasonable detail based on information obtained from other sources." *Id.* at 757. Finally, if the grand jury finds it difficult to obtain evidence from other sources, "this fact in and of itself will go far toward satisfying the need requirement." *Id.*

If a "demonstrated, specific need" is shown, then the subpoenaed testimony shall be given to the grand jury unless there is "no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *United States v. R. Enterprises*, 498 U.S. 292, 300 (1991). "The question of what evidence might reasonably be relevant to the grand jury's investigation should be answered by reference to the reasons the grand jury gave in explaining its need for the subpoenaed materials." *In re Sealed Case*, 121 F.3d at 759.

The Court ordered the OIC to make a showing of need and the OIC made an extensive *ex parte* submission to the Court on that subject, which the Court has reviewed *in camera*. The submission surveys a substantial portion of the evidence gathered by the grand jury during the OIC's investigation to provide background for the OIC's explanation of why certain inquiries must be directed to the White House and the President's closest advisers. The OIC attaches portions of the grand jury testimony of Lindsey[5] and Blumenthal that highlight the questions they declined to answer on the basis of executive privilege.

In general, Lindsey declined to answer questions relating to [REDACTED]. He also declined to discuss [REDACTED]. Blumenthal declined to answer questions relating to [REDACTED]. The submission delineates nineteen categories of information it seeks from Lindsey and three categories of information it seeks from Blumenthal and describes how each category meets the *In re Sealed Case* need standard.

Because the Court has reviewed the documents *in camera*, and most, if not all, of those documents are protected by Federal Rule of Criminal Procedure 6(e)(2), its finding of need cannot be detailed. *See id.* at 740. The Court cannot describe the categories of evidence needed in any more detail than it has already because doing so would reveal "matters occurring before the grand jury." *See* Federal Rule of Civil Procedure 6(e)(2). The Court finds that the categories of testimony sought by the OIC from Lindsey and

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[5] Upon the motion of Lindsey, the Court has reviewed the transcript of his complete grand jury testimony as well.

Blumenthal are all likely to contain relevant evidence that is important to the grand jury's investigation. *In re Sealed Case*, 121 F.3d at 754. The OIC has been authorized to investigate whether Monica Lewinsky "or others," including President Clinton, suborned perjury, obstructed justice, or tampered with witnesses. Order of the Special Division, Jan. 16, 1998. The testimony sought and withheld based on executive privilege is likely to shed light on that inquiry, whether exculpatory or inculpatory. *In re Sealed Case*, 121 F.3d at 754.

In addition, [REDACTED]. If there were instructions from the President to obstruct justice or efforts to suborn perjury, such actions likely took the form of conversations involving the President's closest advisors, including Lindsey and Blumenthal. Additionally, if the President disclosed to a senior adviser that he committed perjury, suborned perjury, or obstructed justice, such a disclosure is not only unlikely to be recorded on paper, but it also would constitute some of the most relevant and important evidence to the grand jury investigation. The D.C. Circuit noted that if a crime being investigated by the grand jury relates to "the content of certain conversations," then the grand jury's need for the exact text of those conversations is "*undeniable*." *Id.* at 761 (quoting *Senate Select*, 498 F.2d at 732) (emphasis added).

The Court also finds that the OIC has met its burden of showing with specificity that the evidence is not available with due diligence elsewhere. *See id.* at 754. The OIC seeks testimony regarding conversations that took place within the White House and the only sources of that testimony are those persons participating in the conversations. Further, the OIC presented the Court with detailed information about its unsuccessful efforts to obtain this evidence through other sources. The OIC has diligently pursued other alternatives where feasible.[6] [REDACTED]

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[6] The White House claims to have offered to permit non-attorney advisors such as Blumenthal to testify as to *factual* information in executive communications but refuses to permit them to disclose strategic deliberations. However, the White House fails to establish the parameters of factual and strategic matters and the Court finds it difficult to discern in advance whether communications are strategic or factual. For example, if directions were given to obstruct justice in some fashion, such directions could constitute a strategic decision but could also be characterized as a factual

In sum, the OIC has provided a substantial factual showing to demonstrate its "specific need" for the testimony. *Nixon*, 418 U.S. at 713. The Court finds that the evidence covered by the presumptive privilege remains necessary to the grand jury and cannot feasibly be obtained elsewhere. The Court will grant the OIC's motions to compel the testimony of Lindsey and Blumenthal insofar as they have asserted executive privilege.

B. [REDACTED]

C. Official Attorney-Client Privilege and Work Product Protection

Lindsey has asserted an absolute governmental attorney-client privilege in response to grand jury questions concerning his communications with the President, members of the White House Counsel's Office, grand jury witnesses or their attorneys, and the President's personal attorneys. The attorney-client privilege protects communications from clients to their attorneys that were intended to be confidential and were made for the purpose of obtaining legal advice. *See Tax Analysts*, 117 F.3d at 618. Communications from attorneys to their clients are also protected if the communications "rest on confidential information obtained from the client." *Id.* (citation omitted). Lindsey claims to have performed legal services as Deputy Counsel to the President for his client, the Office of the President. He has "advis[ed] the Office of the President on whether the President should assert his official privileges to protect the communications at issue here from compelled disclosure, and gather[ed] the facts needed to reach a recommendation on that question." White House's Mem. Concerning President Clinton's Suppl. Filing in Support of Opp. to Mot. to Compel Testimony of Bruce Lindsey, at 2. In addition, Lindsey has gathered information including talking to grand jury witnesses or their attorneys in order to provide legal advice to the Office of the President with respect to potential impeachment proceedings.

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event. Not only was the White House offer ambiguous, but there is also some question as to whether it was a firm offer. Given the ambiguity of the offer, the Court declines to factor it into its decision.

Lindsey also asserts an absolute governmental attorney-client privilege with respect to advice he rendered to the Office of the President on "how best to prevent other litigation in which the President is involved from hampering the Presidency's fulfillment of its institutional duties." *Id.* To the Court's knowledge, the only "other litigation in which the President is involved" is the Paula Jones suit. Additionally, Lindsey asserts the governmental privilege with respect to his communications with the President's personal attorneys pursuant to the common interest doctrine. He claims that the Office of the President and the President as an individual share certain common interests that permitted confidential communications between the Office of the White House Counsel and the President's personal attorneys. Lastly, Lindsey has asserted the governmental work product doctrine in response to questions regarding his interviews with grand jury witnesses and their counsel.

1. The Attorney-Client Privilege in the Federal Grand Jury Context

The White House asks the Court to recognize an absolute governmental attorney-client privilege in the context of a federal grand jury investigation of an official's alleged private misconduct. The OIC argues that no such privilege should exist in this context.

The Court begins by noting that privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*, 418 U.S. at 710. Privileges should be recognized "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (citations omitted). When deciding whether to recognize asserted privileges, courts are instructed by Federal Rule of Evidence 501 to interpret the common law privileges "in the light of reason and experience." Pursuant to Rule 501, this Court must determine whether the asserted privilege has any history of being applied under the circumstances here, and if not, whether applying such a privilege would serve some important public interest.

Only two Courts of Appeal have addressed the issue of whether a governmental attorney-client privilege can be asserted in response to a federal grand jury subpoena. The Sixth Circuit explained that it has assumed that a governmental attorney-client privilege exists but has "never explicitly so decided." *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998); *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989). Neither Sixth Circuit case decided that a governmental attorney-client privilege exists and neither case involved an investigation of a government official's private conduct; both cases challenged official government conduct.

The Eighth Circuit case, by contrast, did involve a federal grand jury investigation of a government official's private conduct and is the only Court of Appeals case that has actually decided whether a governmental attorney-client privilege should exist in the federal grand jury setting. That case involved a federal grand jury investigation of the private conduct of President and Hillary Clinton in what is known as the Whitewater matter. *See id.* at 913. The White House received a grand jury subpoena seeking "'[a]ll documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton (regardless of whether any other person was present)' pertaining to several Whitewater-related subjects." *Id.* The White House refused to produce two sets of notes responsive to the subpoena, asserting a governmental attorney-client privilege. *Id.* at 914. Both sets of notes were taken during meetings attended by White House attorneys, Mrs. Clinton, and her personal attorneys. *Id.*

The Eighth Circuit required production of both sets of notes, concluding that even if a governmental attorney-client privilege exists in other contexts, "the White House may not use the privilege to withhold potentially relevant information from a federal grand jury." *Id.* at 915. Pursuant to Federal Rule of Evidence 501, the court applied the federal common law of attorney-client privilege to the facts and found that no governmental attorney-client privilege exists in the context of a federal criminal investigation. *Id.* The Eighth Circuit was not persuaded that Proposed Federal Rule of Evidence 503, which defines "client" to include public officers or public organizations, or the few cases involving a gov-

ernmental attorney-client privilege in fact established such a privilege in the grand jury context. *Id.* at 916–17. As a result, the Eighth Circuit "turned to general principles" about privileges and the grand jury and decided not to recognize such a privilege. *Id.* at 918, 919–21.

The majority rejected the dissent's decision to recognize a qualified governmental attorney-client privilege that would be subject to the *Nixon* balancing test regarding executive privilege, concluding that no governmental attorney-client privilege, not even a qualified one, should exist in the federal grand jury context. *In re Grand Jury Subpoena*, 112 F.3d at 919. Under the *Nixon* test, the grand jury's need for the subpoenaed material is balanced against the White House's need for confidentiality. 418 U.S. at 712–13. Executive communications, which the Court discussed earlier, are presumed privileged unless the proponent of the subpoena can overcome the presumption with a sufficient showing of specific need for the privileged material. *Id.* at 713. The dissenting judge in the Eighth Circuit case thought this analysis should apply to the governmental attorney-client privilege to ensure that the President receives candid, confidential legal advice that will be disclosed only if a federal grand jury truly needs it. *In re Grand Jury Subpoena*, 112 F.3d at 926–27. The majority did not find *Nixon* to be "directly controlling" as it addressed a different privilege, but did find the case "indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." *Id.* at 919.

2. Applicability of the Governmental Attorney-Client Privilege

In seeking to compel Lindsey to testify, the OIC asks the Court to follow the majority opinion in the Eighth Circuit case and find that no attorney-client privilege exists in the federal grand jury context. The White House urges this Court not to follow the Eighth Circuit case, insisting that the majority's reasoning is flawed and that the D.C. Circuit clearly recognizes an absolute governmental attorney-client privilege. The White House argues that the attorney-client privilege is an absolute privilege and that it

should therefore apply equally to civil and criminal matters regardless of whether a private or government party asserts the privilege.[7] The amicus brief of the Attorney General asks the Court to recognize a qualified privilege that would "balance the demands of criminal law enforcement against the asserted need for confidentiality [by the White House]." Brief Amicus Curiae for the United States, Acting Through the Attorney General, at 7–8 ("Attorney General Amicus Brief"). While the Attorney General does not request a specific balancing test, she does suggest a standard of need similar to the one established in *Nixon*. *See* Brief Amicus Curiae for the United States, Acting Through the Attorney General, Supporting Certiorari, in *In re Grand Jury Subpoena*, 112 F.3d 910 (8th Cir. 1997), at 15.[8]

In this Circuit, an absolute governmental attorney-client privilege does apply to FOIA cases and other civil cases in which government attorneys represent government agencies or employees against private litigants in matters involving official government conduct. D.C. Circuit FOIA cases,[9] Proposed Rule of Evidence 503, and the D.C. Bar's Rules of Professional Conduct[10] all recognize such a privilege.[11] In light of these authorities and the President's need for confidential legal advice, *see Nixon*, 418 U.S. at 708, the Court concludes that a governmental attorney-client privilege does apply in the federal grand jury context. In *Nixon*, the

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[7] The White House also seeks a qualified governmental attorney-client privilege in the alternative, if the Court rejects its arguments for an absolute privilege.

[8] The Amicus Brief filed in this matter incorporates the arguments made by the Attorney General in support of the petition for certiorari in *In re Grand Jury Subpoena*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997).

[9] *See, e.g., Tax Analysts v. Internal Revenue Service*, 117 F.3d 607, 618 (C.A.D.C. 1997); *Brinton v. Dep't of State*, 636 F.2d 600, 603 (D.C. Cir. 1980); *Mead Data Central v. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).

[10] *See* District of Columbia Rules of Professional Conduct, R. 1.13 & cmt. 7, 1.6 & cmts. 33–36.

[11] "Uniform Rule [of Evidence] 502 limits the governmental privilege to situations involving a pending investigation or litigation and requires a finding by the court that disclosure will 'seriously impair' the agency's pursuit of the investigation or litigation." *In re Grand Jury Subpoena*, 112 F.3d at 916 (citing Unif. R. Evid. 502(d)(6)).

Supreme Court found that President Nixon's need for confidential advice from his advisers supported the existence of an executive privilege, acknowledging that "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* This Court finds the President's need for confidential legal advice from the White House Counsel's Office to be as legitimate as his need for confidential political advice from his top advisers. This compelling need supports recognition of a governmental attorney-client privilege even in the context of a federal grand jury subpoena.

3. The Scope of the Governmental Attorney-Client Privilege

Although the Court finds that a governmental attorney-client privilege should apply in the federal grand jury context, the Court is not willing to recognize an absolute privilege. Even though this privilege is absolute in civil cases, such as FOIA cases, this Court finds FOIA cases to be distinguishable from federal grand jury matters because the former involve civil litigation between the federal government and private parties seeking information from the government, whereas the latter involve criminal matters in which a government party seeks information from another government agency. *In re Grand Jury Subpoena*, 112 F.3d at 918–19. The Court agrees with the Eighth Circuit that the criminal/civil distinction is significant and that "[m]ore particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another." *Id.* at 916 (quoting *Restatement (Third) of the Law Governing Lawyers* § 124 cmt. b). In the context of a federal grand jury investigation where one government agency needs information from another to determine if a crime has been committed, the Court finds that the governmental attorney-client privilege must be qualified in order to balance the needs of the criminal justice system against the government agency's need for confidential legal advice.

The Supreme Court's reasons for recognizing a qualified and not absolute executive privilege in *Nixon* support this Court's conclusion that a qualified governmental attorney-client privilege

should apply in the federal grand jury context. In *Nixon*, President Nixon claimed an absolute executive privilege in response to a trial subpoena for tapes and documents regarding his conversations with his staff and aides. 418 U.S. at 688–89. The Supreme Court held that only a qualified executive privilege should exist in the criminal trial context. *Id.* at 711–12 n.19. This Court agrees with the Supreme Court that "[t]he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III." *Id.* at 707. Although the D.C. Circuit recognizes an absolute government attorney-client privilege in FOIA cases and in other civil cases in which a government attorney represents a government agency or employee, the Court finds that this absolute privilege should not be "expansively construed" to apply to a federal grand jury investigation for such a privilege would clearly be "in derogation of the search for truth." *Id.* at 710. The Court believes that a qualified governmental attorney-client privilege will permit federal grand juries to search for the truth about alleged crimes while simultaneously protecting the need of the White House for confidential legal communications.

The White House claims that candid legal advice will be chilled if the Court does not recognize an absolute governmental attorney-client privilege in the federal grand jury context. Similar arguments were rejected by the Supreme Court with respect to the assertions of executive privilege by President Nixon and with respect to a privilege asserted by state legislators comparable to that of members of Congress.[12] Like the Supreme Court, this Court

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[12] In *United States v. Gillock*, the Supreme Court rejected similar arguments:

> We recognize that denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function; however, similar arguments made to support a claim of Executive privilege were found wanting in *United States v. Nixon*, when balanced against the need of enforcing federal criminal statutes. There, the genuine risk of inhibiting candor in the internal exchanges at the highest levels of the Executive Branch was held insufficient to justify denying judicial power to secure all relevant evidence in a criminal proceeding. Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the

"cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Nixon*, 418 U.S. at 712. The argument is also unpersuasive for reasons articulated by the Eighth Circuit:

> Because agencies and entities of the government are not themselves subject to criminal liability, a government attorney is free to discuss anything with a government official—except for potential criminal wrongdoing by that official—without fearing later revelation of the conversation. An official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney.

In re Grand Jury Subpoena, 112 F.3d at 921. Only a qualified governmental attorney-client privilege in the grand jury context can balance the President's need for frank legal advice against the grand jury's need for relevant evidence of criminal conduct.

Since the *Nixon* decision in 1974, the White House has operated effectively under a qualified executive privilege. The President continues to receive candid political advice from his top aides and the Court has no doubt that the President will continue to receive sound legal advice from White House attorneys under a qualified governmental attorney-client privilege. The Court shares the belief of the D.C. Circuit that:

> So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government—a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations—we be-

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Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.

445 U.S. 360, 373 (1980) (citations omitted).

> lieved in *Nixon v. Sirica*, and continue to believe, that the effective functioning of the presidential office will not be impaired.

Senate Select, 498 F.2d at 730. The Court is confident that "the President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases." *Nixon*. 418 U.S. at 713.

The Court's decision to make the attorney-client privilege qualified like the executive privilege not only respects the needs of the criminal justice system, but also saves courts from having to apply two different privilege standards to conversations commingling political and legal advice to the President. Many of the President's top advisers, such as Lindsey, provide both legal and political advice to the President and White House discussions often involve a mixture of the two. If no privilege applied to legal advice in the White House, as the OIC would have it, White House attorneys might be tempted to characterize their advice as political to acquire the qualified protection of the executive privilege. Similarly, if an absolute privilege applied to legal advice to the President while only a qualified executive privilege applied to political advice, the President and his staff might be tempted to characterize confidential political communications as legal in order to obtain greater protection. The Court finds that an absolute governmental attorney-client privilege would overly complicate communications to the President for both White House employees and the federal courts, that it would unduly frustrate the work of federal grand juries, and that it is not necessary to ensure candid legal advice to the President.

The White House argues that the attorney-client privilege has always been an absolute privilege and that it should not be qualified in the federal grand jury context. Although it is true that a private party may invoke an absolute attorney-client privilege in both civil and criminal matters, including federal grand jury investiga-

tions,[13] the Court finds that the differences between private and governmental organizations noted by the Eighth Circuit provide compelling reasons for qualifying the governmental attorney-client privilege in the context of a federal grand jury investigation. *See In re Grand Jury Subpoena*, 112 F.3d at 920. While the Eighth Circuit majority found these differences provided sufficient grounds for not recognizing any governmental attorney-client privilege in the federal grand jury context, this Court finds the differences support qualifying the privilege so that it may be overcome when a federal grand jury can show sufficient need for otherwise privileged material.

A private organization such as a corporation and a government institution such as the White House differ significantly, especially in the criminal context. First, as the Eighth Circuit pointed out, the conduct of White House personnel cannot subject the White House as a legal entity to criminal liability. *Id.* The alleged conduct of Ms. Lewinsky and President Clinton may subject them to criminal prosecution or impeachment respectively, but their conduct cannot implicate the White House in any criminal or civil litigation. As the Eighth Circuit pointed out, there is a difference between "official misconduct" and "misconduct by officials" and it is clear that "[t]he OIC's investigation can have no legal, factual, or even strategic effect on the White House as an institution." *Id.* at 923. The conduct of corporate employees, however, can expose a corporation to civil and criminal liability. *Id.* For this reason, corporate attorneys need an absolute privilege so that they can obtain candid information from corporate employees and provide competent legal advice to the corporation, as the Supreme Court fully recognized in *Upjohn Co. v. U.S.*, 449 U.S. 383, 389–90 (1981). Given that no liability threatens the White House, its attorneys do not have as compelling a need to obtain fill and candid information from the President regarding an investigation of his alleged private misconduct and thus do not need the protection of an absolute attorney-client privilege as much as private corporations do.

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[13] *See, e.g., Hickman v. Taylor*, 329 U.S. 495 (1947); *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997), *cert. granted sub. nom Swidler & Berlin v. United States*, 66 U.S.L.W. (U.S. Mar. 30, 1998); *In re Sealed Case*, 107 F.3d 46 (D.C.Cir.1997).

In fact, White House attorneys, like all other executive branch employees, have a statutory duty to report any criminal misconduct by other employees to the Attorney General. *See* 28 U.S.C. § 535(b); *In re Grand Jury Subpoena*, 112 F.3d at 920. Unlike a private attorney representing a corporation, when a White House attorney learns that a White House employee has engaged in criminal conduct, he must report such conduct. A private attorney is under no such obligation unless the conduct poses a threat of death, substantial bodily harm, or bribery of witnesses, jurors, or court officials. *See* D.C. Rules of Professional Conduct, Rule 1.6(c); Model Rules of Professional Conduct, Rule 1.6(b). The Eighth Circuit refused to recognize a governmental attorney-client privilege in the context of a federal grand jury investigation in part because such a privilege would conflict directly with the duty established by section 535(b). *In re Grand Jury Subpoena*, 112 F.3d at 920. The White House challenges the Eighth Circuit's reasoning, arguing that section 535(b) and memoranda interpreting it from the Justice Department's Office of Legal Counsel[14] show no congressional intent to vitiate the attorney-client privilege. The Attorney General's amicus brief also asserts that section 535(b) must be interpreted consistently with the governmental attorney-client privilege. *See* Attorney General Amicus Brief at 11.

Nothing in the language of the statute or its legislative history suggests a congressional intent either to vitiate the privilege or to exempt government attorneys from the duty to report. *In re Grand Jury Subpoena*, 112 F.3d at 932 (noting "the absence of any discussion of the subject in the legislative history") (citation omitted). The Court acknowledges that the Justice Department has interpreted the section consistently with a governmental attorney-client privilege outside of the grand jury context. Accordingly, the Court

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[14] *See* Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Memorandum for the Deputy Attorney General re: Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee at 2 (Nov. 30, 1976); Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, Duty of Government Lawyers Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship with Another Government Employee at 6 (March 29, 1985) (both cited in *In re Grand Jury Subpoena*, 112 F.3d at 932 (Kopf, J., dissenting)).

finds that section 535(b) neither precludes nor requires the recognition of a governmental attorney-client privilege in the federal grand jury context. Rather, the Court finds that section 535(b)'s duty to report criminal activity provides further support for the Court's conclusion that the governmental attorney-client privilege should be qualified in the context of a federal grand jury investigation of an official's alleged misconduct. Under a qualified privilege, government attorneys would be required to report privileged information regarding possible criminal activity, as section 535(b) requires, when a federal grand jury could demonstrate sufficient need for such information.

The Court's decision to qualify the governmental attorney-client privilege in the context of a federal grand jury investigation is also supported by the fact that White House attorneys, unlike private attorneys, work for the American public. As the Eighth Circuit pointed out, "the general duty to public service calls upon government employees and agencies to favor disclosure over concealment." *Id.* at 920. The Supreme Court has found that the public responsibilities of accountants weighed against giving them work product immunity, *see United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984), and in refusing to recognize a governmental attorney-client privilege for White House attorneys, the Eighth Circuit recognized that White House attorneys bear far greater public responsibilities than private accountants. *In re Grand Jury Subpoena*, 112 F.3d at 921. This Court finds that the public responsibilities of White House attorneys weigh in favor of requiring them to divulge otherwise privileged information when a federal grand jury needs such information to determine whether a crime has been committed. The Court believes that "the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a[n] [absolute] governmental attorney-client privilege in criminal proceedings inquiring into the actions of public officials." *Id.*

The Court shares the Eighth Circuit's belief that "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets." *Id.* This is especially true given the large number of attorneys working for the federal government. *See id.* (recognizing the "pernicious potential of [a governmental attorney-client privilege] in a government top-heavy with lawyers") (citation omitted). White House attorneys are paid by U.S. taxpayers to provide legal advice on official presidential decisions, not the private decisions of President Clinton, and certainly not private, potentially criminal conduct. Members of the White House Counsel's office are not, and should not be, representing President Clinton in the grand jury investigation regarding Monica Lewinsky; the President's private attorneys have been hired to do this. The Eighth Circuit made this clear to the White House when it refused to recognize a governmental attorney-client privilege under very similar circumstances. *Id.* at 915. Since the issuance of the Eighth Circuit opinion in February 1997, the White House has been on notice that legal communications between the President and White House attorneys regarding federal grand jury investigations of the President or the First Lady's alleged private misconduct are not guaranteed absolute protection. Thus, if President Clinton had legal communications with White House attorneys regarding the grand jury investigation of the Monica Lewinsky matter, just as Hillary Clinton did in the Whitewater grand jury investigation, he did so "at [his] peril" because both the majority and the dissent of the Eighth Circuit opinion made clear that such consultations would no longer be absolutely protected. *Id.* at 927 (Kopf, J., dissenting).[15]

[15] Judge Kopf, in dissent, concluded that the *Nixon* balancing test for executive privilege should apply to the governmental attorney-client privilege and warned Mrs. Clinton that in the future her communications with White House attorneys could be subject to disclosure. He wrote:

> because we should now declare for the first time that *Nixon* overcomes the White House privilege if a proper showing is made, Mrs. Clinton would consult with White House lawyers *at her peril in the future*. She would be informed from our opinion that such consultations might no longer be protected since the other party to her conversations (the White House and its lawyers) could be obligated to respond to a grand jury subpoena if the prosecutor made the showing required by *Nixon*. Consequently, in the future, and to the extent of a grand jury subpoena, any such communications could not legally be "intended" by Mrs. Clinton as "confidential" under Rule 503(a)(4) because she would

4. The Standard of Need

For all of the above reasons, the Court holds that the governmental attorney-client privilege is qualified in the context of a federal grand jury investigation and that, like the executive privilege, it can be overcome by a showing of need. This Court must determine what type of showing must be made to justify release to a federal grand jury of materials protected by the governmental attorney-client privilege. In the Espy case, the D.C. Circuit addressed the same question with respect to the White House's assertion of the executive privilege in response to a federal grand jury subpoena. *In re Sealed Case*, 121 F.3d at 742. As the Court discussed earlier, the D.C. Circuit held that, in order to overcome the presumption of executive privilege, the OIC must show two factors: "first, that each discrete group of the subpoenaed materials likely contains important evidence; and second that this evidence is not available with due diligence elsewhere." *Id.* at 754. The Court finds that the need analysis established by the D.C. Circuit in the Espy case for assertions of the executive privilege in response to a federal grand jury subpoena should also apply to assertions of the governmental attorney-client privilege in response to a federal grand jury subpoena. The need analysis in the Espy case is more relevant and appropriate than the need analysis established by the Supreme Court for trial subpoenas in *Nixon* and properly weighs the President's need for confidential legal advice against the grand jury's need for relevant and otherwise unavailable evidence. *Id.* at 755–57.

Although the Espy case involved the executive privilege, the Court finds that its two-prong need analysis should apply to the government attorney-client privilege for many of the same reasons articulated above in support of the Court's decision to make the governmental attorney-client privilege qualified like the executive privilege in the context of a federal grand jury investigation. The President's need for candid legal advice from the White House Counsel's Office and his need for frank political advice from his

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know and understand that her communications could be "disclosed to third persons."

Id. at 927 (emphasis added).

top advisers are comparable needs that require some degree of confidentiality. The grand jury's need for relevant evidence of crimes applies equally whether the executive privilege or the governmental attorney-client privilege has been asserted. Thus, the competing needs in both cases are similar and the need analysis established by the D.C. Circuit in the Espy case provides a thoughtful balance of these needs. By requiring the Special Prosecutor to show that "each discrete group of the subpoenaed materials [or testimony] likely contains important evidence," the fist prong of the need analysis ensures "that the evidence sought must be directly relevant to issues that are expected to be central to the trial." *Id.* at 754. This prevents the prosecutor from engaging in a fishing expedition and assures the President and White House attorneys that their conversations will be protected unless they directly relate to a central matter of a criminal investigation. The second prong, which requires the prosecutor to show that the subpoenaed evidence "is not available with due diligence elsewhere," provides further protection for the President's need for confidential legal advice. *Id.*

As the Court noted earlier, applying the same need analysis to the White House's assertions of both the executive privilege and the governmental attorney-client privilege has the added benefit of sparing federal courts from having to apply two different legal standards to conversations combining political and legal advice to the President and removes the incentive to characterize one form of advice as the other in order to obtain greater privilege protection. This is especially important in the White House context because advisers such as Lindsey regularly provide both forms of advice within a single conversation. The Court also notes that "[t]he factors of importance and unavailability are also used by courts in determining whether a sufficient showing of need has been demonstrated to overcome other qualified executive privileges, such as the deliberative process privilege or the law-enforcement investigatory privilege." *Id.* at 755 (citing *In re Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1342 (D.C. Cir. 1984)). The Court finds no support for devising a different balancing test of the competing needs of the grand jury and the White House, es-

pecially given the similarities between the Espy case and the case at hand.

For all of the reasons articulated above, the Court holds that although an absolute governmental attorney-client privilege applies to civil cases in which government attorneys represent government agencies or government employees, only a qualified governmental attorney-client privilege applies to a subpoena issued by a federal grand jury. The Court further holds that this privilege can be overcome if the subpoena proponent can show "first, that each discrete group of the subpoenaed materials [or testimony] likely contains important evidence; and second that this evidence is not available with due diligence elsewhere." *Id.* at 754. If the Court finds a sufficient showing of need, the Court shall order compliance with the subpoena subject to the relevancy standard established by *R. Enterprises*, 498 U.S. at 300. *See In re Sealed Case*, 121 F.3d at 759.

5. Application of the Court's Holdings to the Subpoenaed Testimony

The Court directed the OIC to inform the Court as to its need for the testimony withheld by Lindsey on the basis of the governmental attorney-client privilege. The OIC provided the Court with a substantial *ex parte* submission that the Court has reviewed *in camera*. This submission incorporates by reference the substance of the OIC's *ex parte* submission demonstrating its need for conversations covered by the executive privilege because Lindsey often asserted both the governmental attorney-client privilege and the executive privilege with respect to the same subpoenaed communications. The "need" submission regarding the governmental attorney-client privilege identifies fourteen categories of information sought from Lindsey and explains how each category meets the *In re Sealed Case* two-prong need standard.

The Court's finding of need cannot be detailed because the submission was reviewed *in camera* and involves matters subject to Federal Rule of Criminal Procedure 6(e)(2). *See id.* at 740. [REDACTED] The Court cannot describe the categories in any more detail without revealing "matters occurring before the grand jury." *See* Federal Rule of Criminal Procedure 6(e)(2).

The Court finds that all fourteen categories are "likely" to contain evidence that is "important" and relevant to the grand jury's investigation. *In re Sealed Case*, 121 F.3d at 754. As the Court explained before, if there were instructions from the President to obstruct justice or suborn perjury, they were likely communicated to his closest advisors, such as Lindsey, in conversations unlikely to have been recorded on paper. If the White House interviewed grand jury witnesses in order to determine how and whether the President or his aides could avoid compliance with grand jury subpoenas or otherwise obstruct the investigation, then the witnesses' identities and the substance of those interviews would shed light on this. Similarly, if the President disclosed to his closest legal advisor that he committed crimes of perjury or obstruction of justice, he likely made the disclosure in a conversation, not in writing. Because "the content" of the conversations covered by the governmental attorney-client privilege likely contains important and relevant evidence to the crimes under investigation, the grand jury's need for those conversations is as "undeniable" as it is for communications protected by the executive privilege. *Id.* at 761 (citation omitted).

The OIC has shown with sufficient specificity that the subpoenaed testimony from Lindsey is not available with due diligence elsewhere. *See id.* at 754. The D.C. Circuit has stated that "when . . . an immediate White House advisor is being investigated for criminal behavior[,] ... the subpoena proponent will be able easily to explain why there is no equivalent to evidence likely contained in the subpoenaed materials." *Id.* at 755. [REDACTED] The *ex parte* submission amply demonstrates the OIC's diligent but unsuccessful efforts to obtain this evidence from sources other than Lindsey whenever it was possible.

The Court finds that the OIC's showing of need has overcome Lindsey's assertions of the governmental attorney-client privilege. Accordingly, the Court orders Lindsey to comply with the subpoena by answering the questions posed to him by the OIC and the grand jurors. If Lindsey finds the questions do not meet the relevancy standard established by *R. Enterprises*, the Court will be available to make this determination.

6. The Common Interest Doctrine

Lindsey also asserts that conversations with the President's private attorneys that he held in his official capacity as Deputy White House Counsel are protected under the common interest doctrine. [REDACTED], the Court finds that the White House and the President as an individual do not share sufficiently common interests in the grand jury investigation and the Paula Jones case for the common interest doctrine to apply.

7. The Governmental Work Product Doctrine

Lindsey has asserted that the work product doctrine protects subpoenaed testimony regarding his interviews with grand jury witnesses and their attorneys. [REDACTED] Lindsey has indicated that there are no work product documents. [REDACTED] The work product doctrine provides qualified protection for an attorney's work product prepared in anticipation of litigation. *See* Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947). The doctrine applies in criminal cases, *see United States v. Nobles*, 422 U.S. 225, 239 (1975), and courts have "uniformly held that the work product doctrine applies to grand jury proceedings." *United States v. Davis*, 636 F.2d 1028, 1039 n.10 (5th Cir. 1981). It is clear that a government party may invoke the doctrine in civil cases. *See N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975). Even if a governmental work product doctrine applies in the criminal context, the Court finds that it does not apply to Lindsey's interviews because they were not in anticipation of an adversarial proceeding. Whenever the government invokes the doctrine, it bears the burden of establishing its essential elements. *See In re Grand Jury Subpoena*, 112 F.3d at 925. One of the essential elements is that "the attorney was preparing for or anticipating some sort of adversarial proceeding involving his or her client" *Id.* at 924.

In the Eighth Circuit case involving Mrs. Clinton and the Whitewater investigation, the Court held that the work product doctrine did not apply to notes taken by a White House lawyer during a meeting involving Mrs. Clinton, her personal attorneys, and White House attorneys because the White House lawyer did

not take the notes in "anticipation of litigation." *Id.* The Court rejected the White House's argument that the White House lawyer was preparing for the OIC's investigation because the OIC was investigating Mrs. Clinton as a private individual, not the White House. *Id.* Similarly, the Court rejected the White House's claim that its attorneys were anticipating litigation because they expected congressional hearings of employees at the White House and the institution itself. *Id.* The Court did not decide whether a congressional investigation constituted "an adversarial proceeding," but noted that even if it did, "the only harm that could come to the White House as a result of such an investigation is political harm" and that this did not meet the requirements of the work product doctrine. *Id.* at 924–25.

Like the Eighth Circuit, this Court holds that the work product doctrine does not apply to interviews with grand jury witnesses or their counsel conducted by White House attorneys, such as Lindsey, because they were not conducted in anticipation of litigation. Lindsey asserts that he conducted these interviews "for the purpose of providing legal and other advice to the witnesses," [REDACTED], and refers vaguely to "the ongoing grand jury investigation and potential Congressional proceedings," [REDACTED], but fails to explain why these proceedings constitute "litigation" for the White House. The Court finds that Lindsey and other White House attorneys could not have been conducting the interviews in anticipation of an adversarial proceeding because the OIC is not investigating the White House. *In re Grand Jury Subpoena*, 112 F.3d at 924. The White House is not involved in any adversarial proceeding. Neither the OIC nor the Congress will be investigating the White House as an institution with respect to the Lewinsky matter. Because the White House has failed to meet its burden of showing that Lindsey's interviews were in anticipation of litigation, the work product doctrine does not apply to those interviews.

II. CONCLUSION

For the foregoing reasons, the Court will grant the motions of the Office of Independent Counsel to compel the testimony of Bruce Lindsey and Sidney Blumenthal and will deny as moot the

motion to compel the testimony of [REDACTED]. An appropriate Order will issue on this date.

/s/
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

Dated: May 1, 1998

(2)

No. 98-316

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OFFICE OF THE PRESIDENT, PETITIONER,

v.

OFFICE OF INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether under Fed. R. Evid. 501, this Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974), and Section 535(b) of Title 28, a federal government agency can maintain an absolute government attorney-client privilege to withhold relevant evidence from a federal grand jury.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

(i) the United States of America, represented by the Independent Counsel In re Madison Guaranty Savings & Loan Association, *see* 28 U.S.C. § 594(a)(9); and

(ii) the Office of the President of the United States.

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No. 98-316

IN THE

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OCTOBER TERM, 1998

OFFICE OF THE PRESIDENT, PETITIONER,

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OFFICE OF INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported in redacted form at 148 F.3d 1100. The opinion of the district court (Pet. App. 36a-66a) is reported in redacted form at 5 F. Supp. 2d 21.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Section 535(b) of Title 28 provides in relevant part:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General . . . .

STATEMENT

The United States, represented by the Office of Independent Counsel (OIC), filed a motion to compel Assistant to the President Bruce R. Lindsey to testify before a federal grand jury sitting in the District of Columbia. The Office of the President (hereafter "the White House") opposed the motion, asserting *inter alia* a government attorney-client privilege. The district court granted the OIC's motion to compel, Pet. App. 36a-66a, and the court of appeals affirmed, Pet. App. 1a-35a.

1. Pursuant to a January 16, 1998, order of the Special Division of the United States Court of Appeals for the District of Columbia Circuit, the OIC has been investigating whether President William J. Clinton, Monica S. Lewinsky, or others committed federal crimes in concealing the truth from the judicial process during the *Jones v. Clinton* sexual harassment lawsuit.

Shortly after the commencement of this investigation, the grand jury subpoenaed Bruce Lindsey to testify. On three occasions in February and March, Mr. Lindsey refused to answer questions, interposing claims including executive privilege and government attorney-client privilege. *See* Pet. App. 3a, 37a.

2. On March 6, 1998, the OIC moved to compel Mr. Lindsey's testimony. On May 4, 1998, the district court granted the motion to compel in its entirety, holding that neither executive nor government attorney-client privilege barred disclosure.

As to the government attorney-client privilege, the district court agreed with the Eighth Circuit's rejection of an absolute government attorney-client privilege in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997). The district court concluded that any government attorney-client privilege could provide no greater protection than the executive privilege for presidential communications, a privilege that yields to the need for relevant evidence in criminal proceedings. *See United States v. Nixon*, 418 U.S. 683 (1974).

The district court found that the corporate attorney-client privilege did not support the White House's argument because "[a] private organization such as a corporation and a government institution such as the White House differ significantly, especially in the criminal context." Pet. App. 56a. The conduct of corporate employees "can expose a corporation to civil and criminal liability." *Id.* By contrast, the conduct of President Clinton "may subject [him] to criminal prosecution or impeachment," but it cannot expose the White House as an institution to criminal liability. *Id.*

The district court also relied on Section 535(b) of Title 28. That statute requires employees in the Executive Branch to expeditiously report to the appropriate law-enforcement official "any information" relating to federal criminal offenses committed by government officials. Based on this statute, the

district court stated that "White House attorneys, like all other executive branch employees, have a statutory duty to report any criminal misconduct by other employees." Pet. App. 57a.

The district court also analyzed the competing policy considerations. The court quoted with approval the Eighth Circuit's assessment that "the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of an absolute governmental attorney-client privilege in criminal proceedings inquiring into the actions of public officials." Pet. App. 58a (quotation omitted). The court further stated that it "shares the Eighth Circuit's belief" that "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets." *Id.* (quotation omitted). White House attorneys, the court stated, "are paid by U.S. taxpayers" and are not paid to gather facts and provide advice with respect to "the private decisions of President Clinton, and certainly not private, potentially criminal conduct." *Id.* at 59a.

In sum, because the court found that the executive privilege did not bar production of the subpoenaed information in this case (in light of a factual submission filed by the OIC), it concluded that a government attorney-client privilege similarly did not bar production of the subpoenaed information. Pet. App. 60a-63a.

3. On May 28, 1998, in an effort to obtain Mr. Lindsey's testimony as quickly as possible, the OIC on behalf of the United States filed a petition for a writ of certiorari before judgment in this Court. In its brief in opposition to the petition, the White House abandoned its claims of executive privilege. White House Br. in Opp'n at 6, *United States v.*

Clinton, 118 S. Ct. 2079 (1998) (No. 97-1924).[1] The Court denied the petition. 118 S. Ct. 2079 (1998).

4. After expedited briefing and argument, the court of appeals affirmed the judgment of the district court. Pet. App. 1a-35a. At the outset of its opinion, the court stated:

> In these expedited appeals, the principal question is whether an attorney in the Office of the President, having been called before a federal grand jury, may refuse, on the basis of a government attorney-client privilege, to answer questions about possible criminal conduct by government officials and others. To state the question is to suggest the answer, for the Office of the President is a part of the federal government, consisting of government employees doing government business, and *neither legal authority nor policy nor experience suggests that a federal government entity can maintain the ordinary common law attorney-client privilege to withhold information relating to a federal criminal offense.*

Id. at 2a (emphasis added).

In reaching its conclusion, the court of appeals began by noting the differences between government attorneys and private attorneys: "When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed

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[1] Although the White House dropped its claim of executive privilege while the case was pending in this Court, it reasserted executive privilege with respect to Mr. Lindsey's testimony in a subsequent grand jury appearance in August 1998, and also with respect to testimony by other members of the White House Counsel's office that same month. *See* H.R. Doc. No. 105-310, at 206-09 (Sept. 11, 1998).

by those in government, government attorneys stand in a far different position from members of the private bar." Pet. App. 12a-13a. The court explained that the duty of government attorneys "is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure." *Id.* at 13a.

The court of appeals stated that the distinction between government attorneys and private attorneys is embodied in the Constitution, which requires that Executive Branch officials take an oath to defend the Constitution. "This is a solemn undertaking, a binding of the person to the cause of constitutional government, an expression of the individual's allegiance to the principles embodied in that document. Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency." Pet. App. 13a.

Citing sources as diverse as Judge Jack Weinstein, former White House Counsel Lloyd Cutler, former Solicitor General Robert Bork, and the Federal Bar Association, the court of appeals stated that the tradition of disclosure by government attorneys is deeply rooted. Pet. App. 14a, 17a. The court noted that it was "not aware of *any* previous deviation from this understanding of the role of government counsel." *Id.* at 18a (emphasis added).

The American tradition of guarding against public corruption further supported disclosure, the court concluded. Quoting James Madison, the court stated that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy." Pet. App. 15a. Evidentiary privileges work against these interests in open government "because their recognition creates the risk that a broad array of materials in many areas of the executive branch will become sequester[ed]." *Id.* (quotation omitted). Furthermore, the court agreed with the Eighth Circuit that "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal

investigation would represent a gross misuse of public assets." *Id.* (emphasis added) (quotation omitted).

The court of appeals also examined the implications of 28 U.S.C. § 535(b), the statutory reporting obligation applicable to Executive Branch employees. The court stated that "[w]e need not decide whether section 535(b) alone requires White House Counsel to testify before a grand jury," for "at the very least section 535(b) evinces a strong congressional policy that executive branch employees must report information relating to violations of Title 18, the federal criminal code." Pet. App. 16a (quotation omitted). "Section 535(b) suggests that all government employees, including lawyers, are duty-bound not to withhold evidence of federal crimes." *Id.* at 16a-17a. The court of appeals added that the White House itself had previously stated to the Supreme Court that it "embraces the principles embodied in section 535(b)" and that "the Office of the President has a duty, recognized in official policy and practice, to turn over evidence of the crime." *Id.* at 17a (quotation omitted).

The court of appeals noted that the White House's attempt to equate itself to a corporation for purposes of the attorney-client privilege failed, even on its own terms, to justify non-disclosure: "Under the widely followed doctrine announced in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), corporate officers are *not* always entitled to assert such privileges against interests within the corporation, and accordingly must consult with company attorneys aware that their communications may not be kept confidential from shareholders in litigation." Pet. App. 19a-20a (emphasis added). Based on *Garner*, the court of appeals stated that "[a]ny chill on candid communications with government counsel flowing from our decision not to extend an absolute attorney-client privilege to the grand jury context is both comparable and similarly acceptable." *Id.* at 20a.

The court of appeals also found the White House's argument irreconcilable with this Court's decision in *Nixon* because "there is no basis for treating legal advice differently

from any other advice the Office of the President receives in performing its constitutional functions." Pet. App. 2a.

> A President often has private conversations with his Vice President or his Cabinet Secretaries or other members of the Administration who are not lawyers or who are lawyers, but are not providing legal services. *The advice these officials give the President is of vital importance to the security and prosperity of the nation, and to the President's discharge of his constitutional duties. Yet upon a proper showing, such conversations must be revealed in federal criminal proceedings.* Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.

Id. at 23a (emphasis added) (citations omitted).

As to the specter of impeachment raised by the White House, the court of appeals explained that the constitutionally based executive privilege for presidential communications, whatever its scope, was the only conceivable vehicle for the President to use in attempting to prevent congressional encroachment into Executive Branch communications. Pet. App. 20a-22a.

Based on all of these considerations, the court of appeals determined that "[t]he public interest in honest government

and in exposing wrongdoing by government officials, as well as the tradition and practice, acknowledged by the Office of the President and by former White House Counsel, of government lawyers reporting evidence of federal criminal offenses whenever such evidence comes to them, lead to the conclusion that a government attorney may not invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime." Pet. App. 2a.

Judge Tatel dissented in part. He agreed with the majority that "government lawyers working in executive departments and agencies enjoy a reduced privilege in the face of grand jury subpoenas." Pet. App. 24a. He also expressed doubt that the attorney-client privilege was implicated by the communications involved in this case: "[O]n this record it is not clear whether those communications involved official legal advice that would be protected by the attorney-client privilege." *Id.* If such communications were involved, however, Judge Tatel stated that he would draw a distinction between government lawyers serving the President and other government lawyers. Judge Tatel concluded that communications between the President and his official lawyers should be subject to an absolute government attorney-client privilege by which the President lawfully can prevent disclosure in federal criminal proceedings of information incriminating of himself or of others. *Id.* at 29a-32a.

ARGUMENT

The two courts of appeals that have considered the question presented — the D.C. Circuit and the Eighth Circuit — have decisively rejected the White House's legal argument. The only district court to decide the issue has done the same.[2] The courts have concluded that the White House's legal position is wrong as a matter of law and, if accepted,

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[2] The district court in the Eighth Circuit litigation did not reach this question.

would flout "the strong public interest in honest government" and would facilitate a "gross misuse of public assets." Pet. App. 2a, 15a, 58a; *Grand Jury*, 112 F.3d at 921.

The courts are not alone. The White House's argument is sufficiently unmoored from history, law, precedent, and policy that Attorney General Reno, Solicitor General Waxman, and Assistant Attorney General Hunger — political appointees of the President — took the extraordinary step of filing an amicus brief in the court of appeals that is *contrary* to the legal position of the White House (that is, of the President in his official capacity). *See* DOJ C.A. Br. 11 (the Department does "not agree with [the] submission [of the Office of the President]"); DOJ Motion (June 17, 1998).

Apart from the merits, the question presented is narrow. The petition presents only the application, in the grand jury setting, of Federal Rule of Evidence 501 and 28 U.S.C. § 535(b). The case does not concern the scope of a government attorney-client privilege when asserted in congressional proceedings or against parties other than the United States, such as in civil proceedings or cases under the Freedom of Information Act. Nor does the petition involve a *constitutionally* based privilege, such as the executive privilege for presidential communications.

Because the courts of appeals are in agreement, because the decisions of those courts are correct and thoroughly grounded in law and public policy, and because the legal issue is discrete and not constitutional, the petition should be denied.

I

1. The two courts of appeals that have decided this issue are in full accord. As a result, this Court's review is unnecessary to resolve any uncertainty in the law. *See* S. Ct. R. 10(a).

A year ago, the Eighth Circuit ruled that a government attorney-client privilege does not authorize non-disclosure of

information in federal criminal proceedings. *See Grand Jury*, 112 F.3d at 910. The White House filed a strongly worded petition for certiorari. But this Court, without dissent, denied the petition. 117 S. Ct. 2482 (1997). The only relevant change since the Court's denial of certiorari a year ago is that the D.C. Circuit now has addressed the issue and agreed with the Eighth Circuit's decision. As a result, the White House's current petition warrants certiorari no more than its petition of a year ago.

2. In addition, the petition raises an exceedingly narrow legal issue that does not pose the kind of far-reaching consequences that justify this Court's review notwithstanding the absence of a circuit split. The question presented concerns only a common-law government attorney-client privilege invoked against the United States in federal criminal proceedings. *See* Fed. R. Evid. 501, 1101. The issues *not* presented include the following:

First, the case presents no issue with regard to the scope of the privileges that an individual or private corporation can maintain.

Second, the petition raises no issue regarding the application of a government attorney-client privilege in *civil* proceedings. The decisions of the D.C. Circuit and the Eighth Circuit do not deny a government attorney-client privilege in federal civil proceedings where the government is opposed to a private party. *See* Pet. App. 6a-8a; *cf. Nixon*, 418 U.S. at 712 n.19.

Third, the case raises no question as to the scope of the privileges that the Executive Branch can maintain in *congressional* proceedings. The case concerns a *common-law* privilege claim under Rule 501, and Rule 501 does *not* apply to congressional proceedings. *See* Fed. R. Evid. 1101. Congress recognizes privileges only as required by the Constitution or pursuant to its own rules and practices under its Article I authority. *See* S. Rep. No. 104-191, at 11-12 (1995). The White House's references to impeachment thus

are a red herring: The *common-law* Rule 501 issue presented by the petition could not and would not have any effect in any impeachment or other proceedings that Congress may undertake. If the President seeks to advance a privilege claim based on his unique constitutional status and the possibility of impeachment proceedings, the appropriate vehicle (if any) is executive privilege.

Fourth, the case does not involve any constitutionally based privilege, such as the executive privilege for presidential communications. The White House maintains that the decision of the court of appeals "upsets the constitutional balance of powers." Pet. 18. That assertion makes no sense: The petition presents no constitutional question, and the White House has never suggested (nor could it plausibly do so) that *the Constitution* requires a government attorney-client privilege. In fact, even the historically rooted attorney-client privilege *for individuals* is not embodied in the Constitution.

Indeed, because the question presented involves only the application of a federal statute and a federal rule of evidence, Congress can further study the issue and address it legislatively. Alternatively, the President could direct the Attorney General to exercise her inherent constitutional authority and specific statutory authority under 28 U.S.C. § 535(b), which we discuss below, to establish regulations or policies limiting the information that federal prosecutors (including independent counsel) can obtain from government attorneys.[3]

In short, the question presented is narrow, it is not constitutional, and it does not justify review in the absence of disagreement in the courts of appeals.

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[3] An independent counsel would be bound by 28 U.S.C. §§ 594(f) and 596(a) to follow established, generally applicable regulations or policies "except to the extent that to do so would be inconsistent with the purposes" of the statute. *Id.* § 594(f).

3. The OIC filed a petition for certiorari before judgment in May 1998 based on the national interest in prompt completion of the aspects of the OIC's criminal investigation relating to Monica Lewinsky. At that time, it was our judgment that this Court's review would be a foregone conclusion if the D.C. Circuit were to disagree with the Eighth Circuit. And it also was our judgment that the Nation's interests would be best served by avoiding the delay occasioned by two layers of appellate review of the district court's decision. The only way *ex ante* to ensure that such delays did not occur was to seek certiorari before judgment.

Although this Court denied the petition, the D.C. Circuit subsequently agreed with the Eighth Circuit's decision. The agreement between the Eighth Circuit and the D.C. Circuit has avoided the circuit split that otherwise would have called for review by this Court. At this point, therefore, the bases on which we filed our petition for certiorari before judgment — the interest that the grand jury gather all relevant evidence in an expeditious manner and the concomitant necessity for final court rulings — counsel against certiorari.

II

The decisions of the D.C. Circuit and the Eighth Circuit are correct. Four separate sources of law dictate the conclusion that a government attorney-client privilege does not apply in federal criminal proceedings: (i) traditional considerations under Rule 501; (ii) this Court's precedent (particularly *United States v. Nixon*); (iii) Section 535 of Title 28; and (iv) public policy.

1. Traditional considerations undergirding Rule 501 analysis lend no support to the White House's claim. The federal courts apply common-law privileges "in the light of reason and experience." Fed. R. Evid. 501. The Court's decisions under Rule 501 rest on the premise that the public "has a right to every [person's] evidence," *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996), and treat that principle as "particularly applicable to grand jury proceedings," *Branzburg v. Hayes*,

408 U.S. 665, 688 (1972). This Court has been mindful that testimonial privileges "obstruct the search for truth," and thus has erected a "presumption against the existence of an asserted testimonial privilege." *Id.* at 690 n.29, 686. As the Court stated in *United States v. Nixon*, privileges "are not lightly created nor expansively construed." 418 U.S. at 710. Accordingly, the Court has limited the application of common-law privileges to circumstances in which the application is both (i) historically rooted or well recognized in the States and (ii) justified by a "public good." *Jaffee*, 518 U.S. at 9; *see Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2088 (1998); *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189, 195 (1990).

In this case, the historical and legal foundations for the White House's privilege claim are nonexistent. To our knowledge, no case, statute, rule, or agency opinion — *ever* — has concluded that a department or agency of the United States (or any state government entity) can maintain a governmental attorney-client privilege in federal criminal or grand jury proceedings. *See Grand Jury*, 112 F.3d at 916-18. Nor are we aware of a contemporary *state* case, law, or rule adopting the privilege for *public* attorneys in state criminal proceedings.

The practice of Executive Branch agencies further reveals that the privilege claim in the criminal context is not rooted in historical practice or contemporary understandings. In the Iran-Contra investigation, for example, White House and other government lawyers provided extensive information about their conversations with the President and other government officials. *See, e.g.*, Final Report of the Independent Counsel for Iran/Contra Matters, Vol. I, at 44, 346-48, 366-68, 470 n.137, 474-79, 517, 520, 536 & nn.116 & 117 (Aug. 4, 1993). In addition, in the OIC's investigation of other matters within its jurisdiction, the White House and other Executive Branch agencies have disclosed vast amounts of information that, under the White House's current

argument, would have been protected by a government attorney-client privilege.

In its amicus brief in the court of appeals, the Justice Department confirmed the absence of any historical or legal foundation for the White House's privilege claim. According to the Department, it is the "rare" case where information possessed by agency attorneys is withheld from a federal criminal investigation conducted by Department of Justice prosecutors. DOJ C.A. Br. 3-4. Indeed, the Department has not identified a single instance in which an Attorney General has authorized an agency to withhold important factual information from a federal criminal investigation on the sole ground that a government attorney representing governmental interests possessed the information.

This consistent practice, coupled with the absence of any authority supporting petitioner, both (i) refutes the White House's suggestion that a government attorney-client privilege has traditionally justified withholding relevant information from the federal criminal process and (ii) counsels judicial rejection of the White House's privilege claim. *See Swidler & Berlin*, 118 S. Ct. at 2088; *University of Pennsylvania*, 493 U.S. at 195; *Branzburg*, 408 U.S. at 685-87; *cf. Bankamerica Corp. v. United States*, 462 U.S. 122, 131 (1983) ("Government's failure for over 60 years to exercise the power it now claims . . . strongly suggests that it did not read the statute as granting such power").[4]

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[4] Leading commentators and the American Law Institute similarly have concluded that government entities should not possess the absolute attorney-client privilege available to corporations (particularly, when the privilege is asserted against the government). *See* 24 Wright & Graham, *Federal Practice and Procedure* § 5475, at 125 (1986) ("number of considerations" militate against "expansion of the privilege to all governmental entities"); *McCormick on Evidence* § 87.1, at 321 (4th ed. 1992) ("[w]here the entity in question is governmental . . . significantly different considerations appear"); Restatement (Third) of the Law Governing Lawyers § 124 cmt. b (Proposed Final Draft No. 1) ("More particularized rules may be necessary where one agency of government

2. As all of the courts to decide this issue have correctly concluded, the White House's privilege claim is irreconcilable with this Court's decision in *Nixon*.

In *Nixon*, the Court held that the executive privilege for Presidential communications — a privilege constitutionally based, historically rooted, and "fundamental to the operation of Government," 418 U.S. at 708 — was overcome by the need for relevant evidence in a criminal investigation. *Nixon* leads inexorably to the conclusion that a *common-law* government attorney-client privilege similarly must yield to the need for relevant evidence in a criminal investigation. *See* Pet. App. 23a (*Nixon* "severely undercuts the argument of the Office of the President regarding the scope of the government attorney-client privilege"); *Grand Jury*, 112 F.3d at 919 (*Nixon* "is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes").

As the D.C. Circuit explained, there is no reason that "a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions with his Vice President or a Cabinet Secretary." Pet. App. 23a. In the end, this Court's decision in *Nixon* generates a fundamental question that the White House has been unable to answer: How, as a matter of federal common law, can communications between a President and his closest advisors (subject to a deeply rooted constitutional privilege "fundamental to the operation of Government") be deemed *less* worthy of protection in criminal proceedings than communications between *any* government employee and government attorney (as to which

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claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.").

there is neither historical nor contemporary support for a privilege)?

Not only has the White House failed to persuasively answer the question, it has not tried. Its 29-page petition does not address *Nixon* — *at all* — despite the fact that both the Eighth Circuit and the D.C. Circuit found *Nixon* of substantial analytical importance.[5]

3. Even apart from the dearth of historical or contemporary support for the White House's argument, and even apart from *Nixon*, the White House's common-law privilege claim fails because it is contrary to federal statutory law. Rule 501 provides that privileges in federal proceedings are "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience" except, *inter alia*, as "provided by Act of Congress." In this case, Section 535(b) of Title 28 imposes a specific statutory obligation on Executive Branch employees that contravenes the White House's common-law privilege claim. The statute provides that "*[a]ny information* . . . received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees *shall be expeditiously reported*" to the designated federal law-enforcement officer — in this instance, within his limited criminal jurisdiction, the independent counsel. 28 U.S.C. § 535(b) (emphasis added).[6]

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[5] The district court in this case and Judge Kopf in his separate opinion in the Eighth Circuit both concluded that government attorney-client communications should receive protection no greater than, but also no less than, the protection accorded Presidential communications under *Nixon*. That conclusion led those two Judges, based on their understanding of *Nixon*'s requirements relating to executive privilege claims, to suggest certain prerequisites that a prosecutor similarly must satisfy to obtain government attorney-client information. The district court found that the OIC had satisfied those requirements here. Pet. App. 47a, 63a.

[6] "When issuing [grand jury] subpoenas, an independent counsel stands in the place of the Attorney General." S. Rep. No. 100-123, at 22 (1987). The White House suggests that the OIC, by relying on Section

While not relying solely on Section 535(b), the D.C. Circuit stated that the statute "evinces a strong congressional policy that executive branch employees must report information relating to violations of Title 18, the federal criminal code." Pet. App. 16a (quotation omitted).[7] The court concluded that "Section 535(b) suggests that all government employees, including lawyers, are duty-bound not to withhold evidence of federal crimes." *Id.* at 16a-17a. The Eighth Circuit similarly found Section 535(b) "significant" because it established that "executive branch employees, including attorneys," have a duty to report information relating to criminal wrongdoing. *Grand Jury*, 112 F.3d at 920.

A variety of sources buttress the plain language of the Section 535(b) and support the conclusion that the statute requires disclosure of information by government attorneys

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535(b), is claiming to represent both the prosecutorial *and* non-prosecutorial interests of the United States. *See* Pet. 22-24. But that is not so. The President and the Attorney General possess inherent constitutional power and explicit statutory authority under Section 535(b) to order an independent counsel to withdraw a particular subpoena to an Executive agency. The President and Attorney General also could adopt regulations limiting the ability of federal prosecutors to obtain access to government attorney-client information. And they could order dismissal of an independent counsel if he or she refused to follow either such regulations or a direct order of the President or Attorney General. But a President and an Attorney General cannot end-run those constitutional and statutory mechanisms by asking the courts to create a *common-law* privilege in the face of a clear statutory disclosure obligation intended to grant the independent counsel free access and "complete cooperation."

[7] At various points in its petition, the White House suggests that the D.C. Circuit's opinion requires disclosure only of client communications that directly reveal criminal activity. *See* Pet. 16-18. At other places, however, the White House correctly states that the D.C. Circuit held that a government attorney-client privilege does not apply at all in federal criminal proceedings. *See* Pet. 12 (court "declar[ed] that no attorney-client privilege exists at all in criminal cases"). The latter is correct: If the court of appeals in fact had limited its ruling to communications that directly reveal criminal activity, the court could not have affirmed the judgment of the district court on this issue.

(unless some overriding constitutional privilege applies). They include:

(i) the legislative materials leading to enactment of Section 535(b), *see* H.R. Rep. No. 83-2622 (1954), *reprinted in* 1954 U.S.C.C.A.N. 3551, 3552 (federal prosecutor "should have complete cooperation from the department or agency concerned");

(ii) federal regulations, *see* 5 C.F.R. § 2635.107 (1998) ("Disclosures made by an employee to an agency ethics official [generally an attorney] are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code.");

(iii) Office of Legal Counsel opinions, *see* 6 Op. OLC 626, 627 (1982) ("evidence of criminal conduct" uncovered during an inspector general investigation "will be referred directly to the Department of Justice, as is required by 28 U.S.C. § 535");[8] and

(iv) statements of former officials, such as former White House Counsel Lloyd Cutler, *see* Cutler, *The Role of the Counsel to the President of the United States*, *in* 35 Record of the Association of the Bar of the City of New York, No. 8, at 470, 472 (1980) (discussing "statutory duty to report to the Attorney General any evidence you run into of a possible violation of a criminal statute").[9]

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[8] The White House has previously cited several unpublished OLC memoranda and argued that they support a government attorney-client privilege available in criminal proceedings. But those memoranda refer only to representations of government employees in their *personal* capacities, such as in *Bivens* cases. Those OLC memoranda have no application here — as the Eighth Circuit correctly concluded a year ago when it reviewed those same materials. *See Grand Jury*, 112 F.3d at 921 n.10.

[9] Mr. Cutler added that "[w]hen you hear of a charge and you talk to someone in the White House . . . about some allegation of misconduct, almost the first thing you have to say is 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'" *Id.*

In sum, the plain language and traditional understanding of Section 535(b) preclude the White House's *common-law* privilege claim.[10]

4. Even if the White House could establish that its claim were (i) rooted in historical or contemporary law, (ii) consistent with this Court's precedents, and (iii) compatible with federal statutory law, it still would have to demonstrate that application of this privilege against the United States in federal criminal proceedings would serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jaffee*, 518 U.S. at 9. The opinions of the Eighth and D.C. Circuits powerfully illustrate that the relevant policy considerations do not support the White House's claim.

To begin with, under the White House's theory, a government official (including a President) could tell a White House or other agency attorney that he had concealed subpoenaed documents or physical evidence, and the communication would be absolutely privileged in criminal proceedings. An agency employee could tell an agency attorney that he had falsified his financial disclosure form or embezzled money from the agency, and the communication would be absolutely privileged in criminal proceedings. A prison guard might admit to an agency attorney that he had

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[10] This Court has refused to apply common-law privileges that would contravene statutory disclosure or reporting requirements. In *University of Pennsylvania*, for example, this Court rejected an academic peer-review privilege claim because Title VII authorized government access to information relevant to a discrimination charge and did "not carve out any special privilege relating to peer review materials." 493 U.S. at 191. Similarly, in *United States v. Arthur Young & Co.*, the Court rejected an accountant's work-product claim because Section 7602 of Title 26 granted the IRS a right of access without providing a privilege. The Court stated that "the very language of § 7602 reflects . . . a congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry. . . . If the broad latitude granted to the IRS by § 7602 is to be circumscribed, that is a choice for Congress, and not this Court, to make." 465 U.S. 805, 816-17 (1984).

beaten a prisoner, and the communication would be absolutely privileged in criminal proceedings. It strains credulity that such results — in which attorneys who are *public* employees conceal evidence from the criminal process — serve a "public good."

The White House's desire for a blackout of government information from the grand jury also conflicts with first principles. As the D.C. Circuit stated, "openness in government" — particularly when White House officials may have committed crimes — "has always been thought crucial to ensuring that the people remain in control of their government." Pet. App. 15a (quotation omitted). And as the federal courts have concluded, the White House's contrary and ahistorical vision of the role of government attorneys both flouts the "strong public interest in honest government" and represents "a gross misuse of public assets." *Grand Jury*, 112 F.3d at 921; Pet. App. 15a, 58a.

The White House nonetheless insists that the attorney-client privilege must apply to government agencies against the grand jury to the same extent that it applies to corporations against the grand jury. But a government agency has a dramatically different relationship to the criminal process than does a corporation. The most obvious difference is that a corporation can be indicted, whereas a government entity cannot. That means that the White House as an institution (or the President in his official capacity) can never be a defendant adverse to the United States in a criminal case. *See Grand Jury*, 112 F.3d at 920.

Even were the Court to accept the threshold validity of the White House's argument that it is akin to a corporation, that argument still would not support the White House's conclusion. If corporate shareholders bring a lawsuit alleging misconduct on the part of corporate managers, the attorney-client privilege does not bar the testimony of the corporation's attorneys. *See Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970) (no absolute corporate attorney-client privilege in the context of a shareholder derivative suit); *see*

also Restatement § 134B reporter's note (approving *Garner* principle and stating that it has been "widely followed," including in areas "beyond shareholder suits"). "Although the *Garner* rule does increase uncertainty to some extent, *the risk is not great for organizations attempting to comply with the law in good faith.*" Restatement § 134B reporter's note (emphasis added).

The *Garner* principle, applied to the government context, is straightforward: A federal government agency cannot rely on a common-law attorney-client privilege to thwart the United States' right to information any more than a corporation can do so to frustrate its shareholders' right to information. As the D.C. Circuit stated, "[a]ny chill on candid communications with government counsel flowing from our decision not to extend an absolute attorney-client privilege to the grand jury context is both comparable and similarly acceptable." Pet. App. 20a.

Moreover, apart from *Garner*, the primary justification for the corporate attorney-client privilege does not apply to government agencies. The corporate privilege serves the policy of encouraging corporations to conduct internal fact-finding and thereby promote broader interests in observance of the law. *See Upjohn Co. v. United States*, 449 U.S. 383, 391-92 (1981). If there were no corporate privilege, corporations would be discouraged from conducting internal investigations because the facts developed would be subject to immediate disclosure to a federal grand jury, thereby exposing the corporation to serious criminal liability.

That legal deterrent to gathering facts and performing legal work does not apply in the governmental context. Federal agencies, unlike corporations, are not subject to criminal investigation or indictment by the United States. When an agency becomes aware of internal wrongdoing, the agency's *governmental* interest is to ferret it out, and there can be no risk of endangering a *governmental* interest by

doing so and by disclosing the results to federal law enforcement authorities. *Cf.* 28 U.S.C. § 535(b).[11]

Finally, this Court has firmly rejected the suggestion that the common law of privileges takes no account of the different responsibilities of public and private entities. In declining to apply a work-product privilege to an accountant's workpapers, the Court emphasized:

> The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. . . . [T]he independent auditor assumes a *public* responsibility . . . . This "public watchdog" function demands that the accountant maintain total independence from the client at all times and *requires complete fidelity to the public trust.* To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with *public* obligations.

Arthur Young, 465 U.S. at 817-18 (emphases added). The Court's language applies here as well: Government attorneys, far more than accountants, owe a public duty inconsistent

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[11] The White House suggests, however, that the lack of a government attorney-client privilege would result in a chilling effect on communications by government employees to government attorneys. Pet. 25. But an employee communicating to an agency attorney does not control the ultimate assertion of any privilege. Accordingly, the employee can have *no* assurance that the communications will remain confidential if called for in federal criminal proceedings, regardless of what the privilege rule may be. A President similarly could not be assured of the ultimate protection from the criminal process of his communications to *government* lawyers: The President's control over the privilege for his own communications terminates when he leaves Office. *See CFTC v. Weintraub*, 471 U.S. 343, 349 & n.5 (1985).

with application of governmental attorney-client privilege in federal criminal proceedings.

5. One further aspect of the petition warrants mention. Because this Court denied certiorari a year ago on the same legal issue and the D.C. Circuit has now issued an opinion agreeing with the Eighth Circuit, the White House has sought to locate supposed "changes" in the law to support a different outcome for its current petition. The White House thus has seized upon this Court's recent decision in *Swidler & Berlin*. In that case, the Court refused to expand the will-contest exception to the attorney-client privilege after the client's death to other cases, including to criminal cases. *See* 118 S. Ct. at 2085, 2087.[12]

According to the White House, the upshot of *Swidler & Berlin* is that there can be no distinction for the *government* attorney-client privilege between civil cases and criminal cases. The White House's reliance on *Swidler & Berlin* ignores the fact that the distinction at issue here, however, is not simply criminal-civil but also between (i) cases in which the government asserts the privilege against a private party (which generally will be civil cases) and (ii) cases in which the government attempts to assert a privilege against itself (which generally will be criminal cases).[13]

In any event, the Court's opinion in *Swidler & Berlin* regarding criminal and non-testamentary civil proceedings referred only to the *posthumous* privilege question at issue there. *See* 118 S. Ct. at 2087. The Court did not purport to

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[12] At oral argument in the D.C. Circuit, the White House placed heavy reliance on *Swidler & Berlin*, which had been decided four days earlier. As its opinion reveals, the court of appeals found the argument entirely unpersuasive.

[13] *See* Restatement § 124 cmt. b ("More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.").

lay down a sweeping new rule that *all* evidentiary privileges are suddenly "all or nothing" and must be absolute or identical in all proceedings if they are to exist at all. Indeed, if *Swidler & Berlin* had done so, the courts now would have to redefine the contours of, for example, the qualified attorney work-product privilege, many government privileges (including executive privilege), certain established exceptions to the attorney-client privilege, and the reporter's privilege.[14]

Indeed, even in *Swidler & Berlin* itself, the Court did not hold that the *posthumous* attorney-client privilege applies identically in all civil and criminal settings. To the contrary, the Court reaffirmed the testamentary rule, under which the privilege does not apply in certain kinds of civil cases (those involving will contests). *Swidler & Berlin* thus endorsed the longstanding principle that context counts in assessing a privilege claim. *See also Nixon*, 418 U.S. at 712 n.19 (recognizing that executive privilege for presidential communications may apply differently in civil and criminal proceedings).

In the end, the White House's discussion of *Swidler & Berlin* boils down to the proposition that this Court, in a single passage in a case involving the post-death application of the individual attorney-client privilege, overruled *Nixon* and the line of *governmental* privilege cases indicating that *governmental* privileges do not necessarily apply the same in

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[14] In addition, Congress recently enacted a law (which the President signed) that provides a new form of attorney-client/accountant-client privilege that applies in "any *noncriminal* tax matter before the Internal Revenue Service" and in "any *noncriminal* tax proceeding in Federal court brought by or against the United States." Pub. L. No. 105-206, § 3411(a), 112 Stat. 685, 750 (1998) (emphases added) (codified at 26 U.S.C. § 7525(a)). Congress and the President thus have not subscribed to the novel, all-or-nothing privilege regime advanced by the White House in its petition.

criminal and civil cases.[15] Contrary to the White House's assertion, we do not believe that the Court in *Swidler & Berlin* achieved (or sought to achieve) any such dramatic alteration of legal principles not presented in that case; indeed, the entire thrust of the Court's opinion was to resist any perceived change in the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] Under the White House's reading of *Swidler & Berlin*, executive privilege presumably now could be overcome in *civil* cases as easily as it can be overcome in criminal cases.

(3)

No. 98-316

In the Supreme Court of the United States

OCTOBER TERM, 1998

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v.

OFFICE OF INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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OFFICE OF INDEPENDENT COUNSEL, REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, § 595(c) & app. (Sept. 9, 1998) 1

In rewriting the "Question Presented," the Office of Independent Counsel ("OIC") seeks to have the Court treat this case as nothing more than a minor dispute over the Federal Rules of Evidence, and to ignore one crucial fact: an inferior officer of the Executive Branch has been empowered, at his unilateral whim and immune from judicial review, to require the Deputy Counsel to the President to reveal, in the face of the very real threat of impeachment, his advice to the President about his official duties.

That threat, having become dramatically more ominous in the weeks since the court of appeals' decision, was—unbeknownst to the court of appeals and the White House—in fact all too real on June 29, 1998, at the very moment when the Independent Counsel was arguing that it was "too remote a possibility to be considered by the Court." Stephen Labaton, *Lewinsky Case and 'Privilege' Fought in Court*, N.Y. TIMES, June 30, 1998, at A1.[1] On July 2, only *three days* after making that representation to the court of appeals, the OIC moved the Special Division for leave to include in a referral to the Congress matters protected by Fed. R. Crim. P. 6(e). See *In re Madison Guaranty Sav. & Loan Ass'n*, Div. No. 94-1 (D.C. Cir. Spec. Div. July 7, 1998) (granting "'Ex Parte Motion for Approval of Disclosure of Matters Occurring Before a Grand Jury' filed by Independent Counsel Kenneth W. Starr on July 2, 1998"), *reprinted in* OFFICE OF INDEPENDENT COUNSEL, REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, § 595(c), app., vol. 2, tab B (Sept. 9, 1998) ("Referral").[2]

To our knowledge, the OIC never sought to correct the record in the court of appeals. Nor, in its brief in this Court, has the OIC explained why it made such a representation or, for that matter,

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[1] We cite to the newspaper account of the oral argument because no transcript is available. The argument was open to the public and press.

[2] In August 1998, after the court of appeals' decision and after the OIC secretly declared in its July 2, 1998 filing its intention to submit a report to Congress, the OIC recalled Mr. Lindsey and two other members of the Office of Counsel to the President to the grand jury. (See Opp. at 5 n.1; H.R. Doc. No. 105-310, at 206–209 (Sept. 11, 1998)). The OIC did not inform the White House, nor to our knowledge the district court, that it intended to use the testimony in its then-planned report to Congress rather than in furtherance of its grand jury investigation.

even addressed in any meaningful fashion the constitutional implications of its role in the impeachment process.

The White House has been all too aware of those implications since the expansion of the OIC's jurisdiction in January 1998, and has argued from the beginning that the OIC was conducting the grand jury investigation as a stalking horse for the Legislative Branch. The effect of the judgment below will be to allow Congress to pierce the Executive Branch's consultations with its counsel merely by delegating to an inferior executive officer the power to compel their disclosure. That holding is an affront to the separation of powers. Review by this Court is manifestly warranted to restore the constitutional balance.

ARGUMENT

The OIC simply fails to address the important constitutional problems the decision of the court of appeals creates. Most remarkably, contrary to the arguments of both the White House and the United States as *Amicus Curiae* in the court of appeals, the decision below allows an Independent Counsel to do what no other executive branch officer, not even the Attorney General, may do: *require* a *superior officer* in the constitutional hierarchy to divulge his communications with counsel.

This is far too sweeping a power to vest in an "inferior officer" of government. See *Morrison* v. *Olson*, 487 U.S. 654 (1988) (resolving constitutional challenge to powers of Independent Counsel by holding that the Independent Counsel is an inferior officer of the government). When coupled with the statutory subsection providing for a report to Congress, the OIC's essentially unreviewable power to compel disclosure of attorney-client confidences from *higher* officers within the constitutional hierarchy necessarily raises the question whether the OIC has slipped the bounds that ordinarily limit the powers of inferior officers. See *Edmond* v. *United States*, 117 S. Ct. 1573, 1580–1581 (1997) ("'inferior officers' are *officers whose work is directed and supervised* at some level by others who were appointed by presidential nomination with the advice and consent of the Senate"); accord Brief *Amicus Curiae* For the United States, Acting Through the Attorney General, at 14, *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998) ("Amicus Br.") ("the independent counsel . . . has no institutional competence or authority to balance the prosecutorial need for the information against the potential threat to the ability of the President or other high level official effectively to obtain legal advice").[3]

The OIC also fails to address the practical consequences of the decision below. As it stands, the President may not confer regarding official government business with his Counsel with any confidence that their communication will not be disclosed. The President and his Counsel cannot predict in advance whether a future prosecutor may regard their communication, however innocent, as "contain[ing] information of possible criminal offenses" (Pet. App. 2a) and therefore unprivileged. (See Pet. App. 26a). The law has long recognized, however, that this advance assurance of confidentiality is necessary if the privilege is to serve its important public ends. See *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981). By denying the *ex ante* assurance of confidentiality that is essential to foster candor, the decision below places the President at a unique disadvantage and devalues the privilege across the board. The OIC responds by urging the President to retain private counsel, but does not explain how it can be in the public interest for government officials to retain private counsel to advise them on official matters.

The OIC also argues that review is not required here because the court of appeals reached essentially the same conclusion as the Eighth Circuit did last year. That is not so. The Eighth Circuit ruled that communications between the First Lady and lawyers in the Office of the Counsel to the President are not privileged in the face of a federal grand jury subpoena. See *In re Grand Jury Sub-*

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[3] The distance this Independent Counsel has traveled from being an "inferior officer" of the Executive Branch within the meaning of *Edmond* is breathtaking. The Independent Counsel has, in this matter, disagreed with the Department of Justice's view that communications between the President and his Counsel are privileged; opposed the Department of Justice, the Treasury Department, and the professional judgment of the Secret Service that interference in the relations between Presidents and the Secret Service could imperil Presidential security; and has written a brief to the House of Representatives arguing that the President as head of the Executive Branch should be removed from office.

poena Duces Tecum, 112 F.3d 910 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997). The OIC scarcely acknowledges two critical distinctions between the cases: the privileged communications sought here belong to the President of the United States, as head of the Executive Branch of government; and the communications were being sought so that the OIC, an inferior officer of the Executive Branch, could include them in a recommendation to Congress that it impeach the President. While the White House believes that the Eighth Circuit case was wrongly decided, this case presents a substantially different issue.

Other arguments the OIC makes in its Opposition merit brief response:

1. As the Petition demonstrated, the divided panels of the two courts of appeals have applied widely divergent standards to the question presented here. In attempting to paper over the division between the decision below and the ruling of the Eighth Circuit, the OIC argues that the D.C. Circuit simply adopted the Eighth Circuit's analysis and ruled that "a governmental attorney-client privilege does not apply at all in federal criminal proceedings." (Opp. 18 n.7). But that is not what the court below did. Instead, although neither side contended for such a result, it expressly adopted a novel *content-based* test to determine whether the attorney-client privilege protected the communications at issue here. (Pet. App. 2a ("[t]he extent to which the communications . . . are privileged . . . depends, therefore, on *whether the communications contain information of possible criminal offenses*") (emphasis added); see generally Pet. 4 & n.4, 16–18.

The OIC takes issue with this interpretation of the court of appeals' opinion, contending that the privilege is never available in the grand jury context without reference to the content of the conversation. But however one reads the court of appeals' holding, the practical and constitutional effects are the same. Putting aside the question whether there is any justification for creating a content-based, after-the-fact test to determine whether a conversation is privileged, the court of appeals has, in effect, vested in the Independent Counsel sole and unreviewable authority to determine whether any given conversation meets that test. The same result follows under the OIC's theory, for it claims the right, merely by

issuing a grand jury subpoena, to override any privilege that the President may choose to assert. Thus, we return to what is the fatal flaw in the ruling below—that it permits an inferior officer unilaterally to require the disclosure of the President's privileged communications.

2. According to the OIC, the attorney-client privilege asserted here lacks historical foundation. (Opp. 14). This is mere *ipse dixit* on the OIC's part, for its brief ignores *all* of the over forty cases (to say nothing of the statutes and codes of evidence) cited in the Petition—authorities that clearly establish that a governmental client, like any other client, has a legally protected right to confer with counsel in confidence. (Pet. 12–14 & nn.6–8). The OIC's only apparent answer to the unbroken line of authority contradicting the decision of the court below is to explain that those cases did not involve "federal criminal or grand jury proceedings." (Opp. 14). But where the common-law attorney-client privilege is at issue, that is a distinction without a difference. The attorney-client privilege has never been thought to apply differently in civil and criminal cases. *Swidler & Berlin* v. *United States*, 118 S. Ct. 2081, 2087 (1998).[4]

Recognizing the lack of precedential support for the decision of the court of appeals, the OIC next attempts to justify it by reference to "[t]he practice of Executive Branch agencies[.]" (Opp. 14). But the evidence of historical practice on which the OIC selectively relies (Opp. 14–15) proves only that previous administrations have not invoked the attorney-client privilege every time they might have. Indeed, that practice also characterizes the conduct of the White House in this matter. Where disclosures would not jeopardize the President's ability to receive the candid legal

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[4] The OIC also argued in *Swidler & Berlin* that the scarcity of cases specifically applying the attorney-client privilege in criminal cases after the death of the client showed that the privilege was historically unrooted in such cases. Besides rejecting the OIC's proffered civil/criminal distinction, this Court also specifically disputed that the scarcity of cases expressly addressing the question cast doubt on the privilege's historical pedigree, stating instead that the "relatively few court decisions [that] discuss the impact of the privilege's application after death . . . . may reflect the general assumption that the privilege survives[.]" *Swidler & Berlin*, 118 S. Ct. at 2087 n.4.

advice to which he is entitled, the White House has allowed the OIC substantial access to White House records and files, including the production of hundreds of documents responsive to subpoenas directed to the Counsel's office. Apparently, the OIC believes that acts of cooperation and good faith forever estop a party from later asserting applicable evidentiary privileges.

What is more, the historical record belies the OIC's facile assertion that past administrations have not asserted an attorney-client privilege in independent counsel investigations. They have. During the Bush administration, the Counsel to the President and a Deputy White House Counsel both invoked the White House's attorney-client privilege in response to Independent Counsel subpoenas for documents and testimony relevant to the Iran/Contra affair. See 1 FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 478–479 & nn.52, 65 (1993). The circumstances of those cases rendered judicial resolution of the disputes unnecessary, but they leave no doubt that the White House as an institution has long regarded its confidential communications with counsel as being no different, for purposes of the attorney-client privilege, from any other client's communications with counsel.

3. The OIC contends that this Court's decision in *United States* v. *Nixon*, 418 U.S. 683 (1974), overcomes the White House's attorney-client privilege. Of course, *Nixon* involved the executive, not attorney-client, privilege, and is not directly on point here. Nevertheless, the OIC contends that, because the qualified executive privilege is grounded in the Constitution and the absolute attorney-client privilege is grounded in the common law, the attorney-client privilege is less "'fundamental to the operation of Government'" (Opp. 16) and may not, therefore, be invoked in grand jury proceedings.

The OIC's opposition (Opp. 13–14) parrots the very quotes from *Nixon* and from *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), that this Court found to be irrelevant when the attorney-client privilege is at issue. See *Swidler & Berlin*, 118 S. Ct. at 2087–2088 ("both *Nixon* and *Branzburg* dealt with the creation of privileges not recognized by the common law, whereas here we deal with one of the oldest recognized privileges in the law"). Rather than come to grips with this language, the OIC's brief

come to grips with this language, the OIC's brief merely repeats its rejected arguments as if *Swidler & Berlin* had never been decided.

The flaw in the OIC's reliance on the *Nixon* decision is the unsupported assumption that the existence of a testimonial privilege depends on the "importance" of the communications sought to be protected. Neither the OIC, nor either of the courts of appeals to have considered the argument, attempted to show that the privilege protects communications the court deems "important" or "fundamental" to any lesser, or greater, degree than communications not so labeled.

Moreover, we know of no authority, and the OIC cites none, to suggest that the source of law a court consults has any bearing on the validity of the attorney-client privilege. The OIC assumes that constitutionally based privileges are superior to common-law privileges, but this distinction has never been recognized in the law. Indeed, this Court has consistently rejected such a hierarchy of privileges, instead stating that a grand jury "may not itself violate a valid privilege, *whether established by the Constitution, statutes, or the common law.*" *United States* v. *Calandra*, 414 U.S. 338, 346 (1974) (emphasis added). *Nixon* certainly did not hold that an absolute privilege, such as the attorney-client privilege, must give way in circumstances where a qualified privilege could be pierced.

4. The OIC relies on 28 U.S.C. § 535(b) in an effort to find a statutory abrogation of the attorney-client privilege where none exists. That provision, by its terms, does not apply to the White House. It applies to any "department or agency" of the federal government, but the White House is neither. See *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980); *Haddon* v. *Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995). The purpose of the statute was to resolve an interagency turf battle, and Congress did not intend to abrogate any privilege. See H.R. Rep. No. 83-2622, reprinted in 1954 U.S.C.C.A.N. 3551, 3551.[5]

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[5] In the argument on the protective function privilege before the D.C. Circuit, the court pointed out to the OIC that under his argument, a confession made by a

5. Nor does the doctrine of *Garner* v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970)—which has never been adopted by this Court—support the panel majority's result.[6]

Garner rests on principles not implicated here. Most fundamentally, the court adverted repeatedly to the fact that the party claiming the privilege owed a fiduciary duty to the party seeking to discover the communications. In the "particularized context" of a shareholder derivative action, the court found it all but dispositive that "management has duties which run to the benefit ultimately of the stockholders." *Garner*, 430 F.2d at 1101. At its core, therefore, *Garner* stands for the unremarkable proposition that the client's owners are entitled to have the client account for its use of their capital, including to retain counsel.

This reasoning has no application to this case. It cannot plausibly be contended that the OIC is the true holder of the privilege at issue here. The Independent Counsel—an inferior officer to the President—is in no sense the "client" whose communications with counsel are sought to be disclosed. Nor can the court of appeals' reliance on *Garner* be saved by assuming, contrary to our electoral system, that the OIC speaks for the interests of the public as a whole. The interests of the White House as an institution are distinct, and the institution is entitled to defend them against encroachment by other Branches of government or by inferior officers within the Executive Branch. See *Nixon*, 418 U.S. at 692–697

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member of the military to the Military chaplain would not be privileged. The OIC acknowledged that he did not read the statute to abrogate the priest/penitent privilege. Yet there is certainly no room in the text of the statute to conclude that Congress intended to abrogate certain common law privileges and not others. The court of appeals understood this, and limited its reliance on the legislation to only its policy implications.

[6] The court of appeals in *Garner* rejected the conclusion of the district court that the attorney-client privilege was "totally unavailable against the stockholders." *Garner*, 430 F.2d at 1097. Forswearing a total abrogation of the privilege, the court of appeals held instead that the shareholder plaintiffs must "show cause why it [the privilege] should not be invoked in the particular instance." *Id.* at 1104 (emphasis added). The court of appeals here went substantially beyond *Garner* in holding that, if the OIC believes (even wrongly) that a communication "contain[s] information of possible criminal offenses" (Pet. App. 2a), the OIC may discover it without any showing of cause.

(dispute between White House and special prosecutor is justiciable).[7]

6. The OIC's revisionist interpretation of *Swidler & Berlin* v. *United States*, 118 S. Ct. 2081 (1998), collapses under scrutiny. Far from supporting the holding of the court below, that decision leads inexorably to the opposite result. *Swidler & Berlin* involved, as this case does, an attempt by the OIC to narrow the scope of the common-law attorney-client privilege. The OIC argued, and the panel majority of the court of appeals held, that the common-law attorney-client privilege had a narrower scope in criminal cases than in civil cases. This Court rejected that view in language requiring no further elaboration. See *id.* at 2087 ("there is no case authority for the proposition that the privilege applies differently in criminal and civil cases, and only one commentator ventures such a suggestion[.]").

None of the OIC's counter-examples can deflect the force of this Court's reaffirmation that the common-law attorney-client privilege, as it had long been understood, has the same scope in civil and criminal cases. Fed. R. Evid. 501 adv. comm. note ("privileges shall continue to be developed . . . under a *uniform standard applicable both in civil and criminal cases*") (emphasis added).

Thus, it is irrelevant that Congress may choose to enact a *statutory* privilege applicable only in civil cases. (Opp. 25 n.14). Nor is *Swidler & Berlin*'s rejection of the OIC's civil/criminal distinction for the common-law attorney-client privilege of any consequence for the myriad other privileges discussed in the OIC's brief. (Opp. 24–26). The attorney-client privilege occupies "a unique place in our jurisprudence," *People* v. *Knuckles*, 650 N.E.2d 974, 979 (Ill. 1995), and exists to "encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co.* v. *United States*, 449

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[7] See also Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991) (cataloging numerous instances where divergent interests of federal agencies yield justiciable disputes).

U.S. 383, 389 (1981). All of the examples the OIC cites are *qualified* privileges that always turn on precisely the sort of balancing test this Court has long rejected for the absolute attorney-client privilege. See *Swidler & Berlin*, 118 S. Ct. at 2087.

7. Finally, although the OIC clings to the fiction that the Attorney General supports its position (Opp. 10, 15), she does not. In an *amicus* brief strongly supporting the White House's attorney-client privilege, the Department of Justice warned that the OIC's position "would impair the ability of the President . . . to obtain frank, fully informed, and confidential legal advice" and that "[s]uch a result is not necessary for effective federal criminal investigations." Amicus Br. 4. The Department of Justice recognized that no case law supported the "categorical exception to the privilege in criminal proceedings" sought by the OIC. *Id.* at 9. Finally, the Attorney General well appreciated that, because of the "unique, and uniquely consequential, powers and responsibilities" vested in him by the Constitution, "the Nation's interest" requires that "the President must have access to legal advice that is frank, fully informed, and confidential." *Id.* at 24. Because the decision below upsets the constitutional balance of powers and imposes a unique disability on the one constitutional officer who acts for the Nation as a whole, this Court must intervene.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1998

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE PRESIDENT *v.* OFFICE OF INDEPENDENT COUNSEL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98–316. Decided November 9, 1998

The motion for leave to file an unredacted appendix under seal is granted. The petition for a writ of certiorari is denied.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting from the denial of certiorari.

The divided decision of the Court of Appeals makes clear that the question presented by this petition has no clear legal answer and is open to serious legal debate. Both parties agree that the question presented is important and warrants this Court's attention. See Pet. for Cert. 6–7; Pet. for Cert. in *United States of America* v. *Clinton*, O. T. 1997, No. 97–1924, p. 9. I recognize that a denial of certiorari is not a disposition on the merits of that question. See, *e.g.*, *Equality Foundation of Greater Cincinnati, Inc.* v. *Cincinnati*, *ante*, at ___ (STEVENS, J., respecting denial of certiorari). Nonetheless, whether or when other opportunities for this Court to consider the issue arise depends upon whether or when the President, or other Government employees, will risk disclosing to Government lawyers significant matters that, under the Court of Appeals' decision, are not privileged. They may very well choose the cautious course, holding back information from Government counsel, perhaps hiring outside lawyers instead. I believe that this Court, not the Court of Appeals, should establish controlling legal principle in this disputed matter of law, of importance to our Nation's governance. I would grant the petition for certiorari.